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In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals improperly held that the Commission's guidelines encouraging applications for broad grants of new motor carrier operating authorities were in fact rules which were invalid under the Motor Carrier Act of 1980.

2. Whether the court of appeals improperly held that the Commission's guidelines for the reasonable broadening of existing motor carrier operating authorities were in fact rules which were invalid under the Motor Carrier Act of 1980.[1]

3. Whether the court of appeals improperly intruded upon the agency's discretion to interpret in the first instance, and to implement by policy, rule, and individual adjudication, the liberalized licensing provisions of the Motor Carrier Act of 1980.

4. Whether the writ of mandamus issued by the court of appeals, clarifying its earlier decision and ordering the Commission to decide all operating rights cases in accordance with its prior mandate, was proper.

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[1] This issue is also raised in isolation in the Commission's request for a writ of certiorari in *Interstate Commerce Commission* v. *Steere Tank Lines, Inc., et al.*, S. Ct. No. 82-41, filed July 9, 1982.

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v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The October 1, 1981 decision of the court of appeals (as modified by the rehearing decision of October 23, 1981) is reported at 659 F.2d 452 (App. A, 1a-60a). The initial mandate of the court of appeals was issued on November 13, 1981 (App. B, 61a-62a). The February 25, 1982 decision of the court of appeals granting, in part, the petition for a writ of mandamus is reported at 669 F.2d 957 (App. C, 63a-83a). Rehearing was denied by the court of appeals on March 9, 1982 and a Statement of Reasons issued March 10, 1982 (App. D, 83a-86a). The March 30, 1982, decision of the court of appeals denying, in part, the request for a writ of mandamus is

at 673 F.2d 82 (App. E, 87a-98a). Associate Justice White's stay of the court's February mandamus decision is unreported, but is appended as Appendix F, 99a-100a.

The notice of proposed Commission policies and rules in Ex Parte MC-142 (Sub-No. 1) was published at 132 M.C.C. 114 and 45 F.R. 61,326 (App. G, 101a-132a), and the final policies and rules in that proceeding were published at 132 M.C.C. 374 and 45 F.R. 86,747 (App. H, 133a-192a). The Commission's notice of proposed statement of general policy in Ex Parte 55 (Sub-No. 43A) appears at 45 F.R. 45,545 (App. I, 193a-222a) and the final policy was published at 45 F.R. 86,797 (App. J, 223a-280a).

JURISDICTION

Because the February 1982 decision of the court of appeals modified its October decision and mandate, under 28 U.S.C. § 2101(c) the 90-day period for filing a timely petition for certiorari as to the merits of the full controversy commenced when the court of appeals issued its February 25, 1982 decision. (See discussion *infra*, 17-19). By orders of May 17, and July —, 1982, (App. M) Associate Justice White extended the time for filing this petition to July 9, and July 16, 1982, respectively. (App. M, 317a-318a).

The Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 1651(a).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (49 U.S.C. §§ 10101 *et seq.*). are set forth in Appendix K, 281a-310a. The pertinent regulations and policies are set forth in Appendices G through J, identified directly above.

I.

STATEMENT

A. Nature Of The Case

This case involves implementation of the Motor Carrier Act of 1980 (the 1980 Act), enacted on July 1, 1980.[2] The 1980 Act directed the Interstate Commerce Commission to promote competition in interstate motor carriage by relaxing the licensing requirements for carriers proposing to serve the public and by permitting existing carriers to obtain more comprehensive operating authorities.

After appropriate public notice and comment, the Commission established, in December 1980, procedural rules and policy guidelines encouraging (a) new applicants to apply for broader authority than had traditionally been authorized, and (b) existing authority holders to seek removal of restrictions from and broadening of previously-issued narrow authorities.

The already-established trucking interests, represented by the American Trucking Associations, the Teamsters, household goods carriers, and several individual trucking companies, challenged the Commission's new policies in the United States Court of Appeals for the Fifth Circuit.

In October 1981 the court of appeals issued a decision holding that the agency's guidelines encouraging carriers to seek broader, more competitive operating authority were, in fact, rules and as such invalid as exceeding the mandate of the 1980 Act. The court of appeals found the legislative history of the 1980 Act confusing and substituted its judgment for that of

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[2] Pub. L. No. 96-296, 944 Stat. 793.

the Commission as to how the 1980 Act should be interpreted.

Although the court's decision was not clear as to how it was to be applied to individual decisions among the thousands of diverse applications processed by the Commission annually, the agency sought in good faith to comply with the court's mandate as it perceived it.

For months, the Commission and petitioners below debated the proper application of the court's decision. In January 1982 the petitioners below, in the belief that their interpretation of the October decision was the correct one, returned to the court of appeals (a) to have their interpretation held to be the correct one, and (b) to have the court issue a writ of mandamus ordering the agency to take actions consistent with that interpretation. The Commission responded that it would welcome a resolution by the court of the ambiguities in the earlier decision, but that a mandamus order would be inappropriate.

On February 25, 1982, the court of appeals issued a writ of mandamus for the express purposes of (a) clarifying its mandate by resolving ambiguities in its first decision, and (b) ordering the Commission, under threat of contempt sanctions, to comply with its decision, as clarified, beginning March 8, 1982.

Faced with the threat of contempt sanctions, the Commission asked the court below to stay the writ of mandamus pending the agency seeking a writ of certiorari from this Court. The lower court denied that request, on March 9, 1982. The Commission then filed with Supreme Court Associate Justice Byron R. White a petition for a stay of the writ of mandamus pending review on certiorari. By decision of March 29, 1982 Associate Justice White granted the stay request.

By this pleading the Interstate Commerce Commission respectfully petitions the Court for a writ of cer-

tiorari granting review on the merits of the October 1981 and February 1982 decisions.

B. Background

Because this case involves the appropriate means of implementing the Motor Carrier Act of 1980, it is helpful to review the background to this legislation.

1. *Prologue*

The Commission has regulated interstate motor carriage since the enactment of the Motor Carrier Act of 1935 (1935 Act). The 1935 Act was a product of the 1930's Depression. Through restrictive licensing, the 1935 Act was designed to provide a "restraining hand"[3] on the "[c]utthroat competition among truckers"[4] that existed at that time. See *Drum* v. *United States*, 368 U.S. 370, 374-375 (1962).

During the last twenty years, however, it became apparent that a "restraining hand" on interstate motor carriage was no longer productive, but rather that additional competition should be promoted.[5] To

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[3] Comments of Senator Wheeler accompanying his bill S. 1629; S. Rep. No. 482, 74th Cong. 1st Sess. Also see similar comments of Senator Terry, 79 Cong. Rec. 12,209, July 31, 1935.

[4] Ari and Olive Hoogenboom, *A History of the ICC: From Panacea to Palliative*, p. 130 (1976).

[5] See, *Bowman Transp.* v. *Arks.-Best Freight System*, 419 U.S. 281, 297-299 (1974); *May Trucking Co.* v. *United States*, 593 F.2d 1349, 1355-1356 (D.C. Cir. 1979); *P.C. White Truck Line, Inc.* v. *ICC*, 551 F.2d 1326, 1328 (D.C. Cir. 1977); *Trans-American Van Service, Inc.* v. *United States*, 421 F. Supp. 308, 323-324 (3-Judge D.C. N.D. Tex. 1976); *Liberty Trucking Co., Ext.—Gen. Commods.*, 130 M.C.C. 243 (1978), 131 M.C.C. 573 (1979), *aff'd, Assure Comp. Transp., Inc.* v. *United States*, 629 F.2d 467 (D.C. Cir. 1980).

facilitate achieving this objective Congress enacted the Motor Carrier Act of 1980.

2. *The Motor Carrier Act Of 1980*

The new law differs markedly from the 1935 Act in that it embodies a "presumption in favor of entry and competition." (Statement of Senator Cannon, 126 Cong. Rec. S7684 (June 20, 1980)). Its passage marked "the beginning of a new era in which those who feel that they have a service to offer to the public have an opportunity to do so." (Statement of Senator Packwood, 126 Cong. Rec. S7685 (June 20, 1980)). The House Committee on Public Works and Transportation summarized the competitive benefits of the legislation (H. Rep. No. 96-1069, 96th Cong. 2d Sess., at 3) (Emphasis added):

> *The legislation establishes a new Federal policy which is to promote a competitive and efficient motor carrier industry* in order to accomplish certain goals. Those goals include meeting the needs of shippers, receivers, and consumers; allowing price flexibility; encouraging greater efficiency, particularly in the use of fuel; and providing service to small communities.
>
> The bill offers increased opportunities for new carriers to get into the trucking business and for existing carriers to expand their services.

The mandate of the 1980 Act is to reduce unnecessary federal regulation [6] and to promote competitive and efficient carrier service.[7]

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[6] Section 2 of the Act expressly mandates reduced regulation.

[7] Section 4 of the Act codified, as part of the National Transportation Policy (49 U.S.C. 10101(a)(7)), the mandate to promote "competitive and efficient transportation services."

To fulfill this objective, Congress directed the Commission to discontinue restrictive licensing by ensuring (a) that all new applicants proposing to offer a useful service responsive to a public need and meeting certain qualifications are granted broad authorities, and (b) that carriers are allowed to broaden their existing restrictive authorities issued under the 1935 Act. The Congressional intent is clear from the colloquy between Senators Cannon and Packwood on the day the bill was passed by the Senate[8] (126 Cong. Rec. S7685, June 20, 1980):

> Mr. CANNON. * * * In addition, I would think the Commission should read the new entry standards in conjunction with the restriction removal section. In other words, the grants of authority under the new law should not continue to be the extremely narrow geographic and commodity grants that are noted throughout the hearing record. Under the restriction removal section, existing carriers have the opportunity to rationalize their operating authority and be able to serve wider areas and carry more commodities. Certainly, we would expect no less for new applicants.

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[8] Evidence of a substantively identical pro-competitive intent by the House of Representatives is found in H.R. Rep. No. 96-1069, 96th Cong., 2d Sess., p. 14 (1980). In its October and February decisions, the lower court disregarded the legislative history from the floor debates because the court found it unclear and conflicting. (659 F.2d at 459). The court of appeals further suggested that resorting to legislative history was unnecessary in view of what it considered to be the plain meaning of the statutory language. (But see, *e.g.*, *Train* v. *Colorado Public Interest Research Groups, Inc.*, 426 U.S. 1, 10 (1976)). Nevertheless, the court itself relied several times in its October decision on the legislative history to support its conclusions.

Mr. PACKWOOD. I would certainly agree with that. I would be terribly disappointed to see a continuation of the restrictive type of certificates that so many carriers have now.

C. The Agency's Implementation Of The 1980 Act

To meet the requirements of the 1980 Act the Commission commenced two proceedings: (1) Ex Parte No. MC-142 (Sub-No. 1), *Removal of Restrictions, Motor Car. of Prop.*, 45 F.R. 61,326 (App. G, 101a-132a), to facilitate the removal of operating restrictions and to otherwise broaden existing unduly restrictive authorities; and (2) Ex Parte No. 55 (Sub-No. 43A), *Acceptable Forms of Requests for Operating Authority*, 45 F.R. 45,545 (App. I, 193a-222a), to provide guidance to applicants for new operating authority by announcing the agency's policies under the 1980 Act.

After analyzing the public comments received, the Commission adopted final rules and policies (discussed below) in December 1980—in Ex Parte No. MC-142 (Sub-No. 1) at 45 F.R. 86,747 (App. H, 133a-192a) and in Ex Parte No. 55 (Sub-No. 43A) at 45 F.R. 86,798 (App. J, 223a-280a).

1. *Restriction Removals*

In Section 6 of the 1980 Act, codified at 49 U.S.C. 10922(h)(1), Congress instructed the Commission to allow existing carriers greater operational freedoms and more opportunities to compete by reasonably broadening commodity classifications and geographic descriptions, and otherwise eliminating unnecessary operating restrictions from their licenses. However, Congress provided only two instances of restrictions

that must be removed.[9] As to other restrictions which should be removed, and the commodity and territorial descriptions which should now be used, the Commission is to apply its own expert judgment (45 F.R. at 61,327 colm. 3; App. G, 108a-109a).

In Ex Parte No. MC-142 (Sub-No. 1), the Commission invited public comment on appropriate commodity and territorial descriptions, among other matters. (*Id.* at 61,328 colm. 3—61,330 colm. 1, 112a-119a). It proposed regulations governing the form and filing requirements for restriction-removal applications, as well as guidelines[10] outlining types of operating restrictions which the Commission envisioned should be removed.

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[9] To comply with the specific directives, the Commission stated (1) that a regular-route carrier providing service between two points could serve all intermediate points as well (App. H, 129a; § 1137.22), and (2) that carriers authorized to provide service only in one direction could and should apply for roundtrip authority (*Id.* § 1137.23).

[10] The Commission, in proposed rule § 1137.20 (45 F.R. at 61,332 colm. 1; App. G, 127a), addressed the substantive significance of the guidelines stating:

> § 1137.20 Scope of this subpart.
>
> This subpart contains guidelines designed to assist applicants in filing applications for the removal of operating restrictions. The guidelines indicate certain types of restrictions or operating limitations in operating authorities which the Commission considers, under normal circumstances, to be excessively narrow, wasteful of fuel, inefficient, or contrary to the public interest. *They suggest ways in which some such restrictions might reasonably be eliminated or in which limited authorities might be broadened. The guidelines are not intended to constitute a prejudgment of any individual application.* (Emphasis added).

The proposed guidelines provided that authority to transport specifically named commodities could be expanded to the full class(es) of commodities involved. The applicable class(es) could be drawn from three different sources: (1) the Standard Transportation Commodity Code (STCC)[11]; (2) other classifications set out in *Descriptions In Motor Carrier Certificates*, 61 M.C.C. 209 (1952) and 61 M.C.C. 766 (1953); or (3) any broader class description the Commission may have accepted in the past. (These three sources are referred to collectively as the tripartite commodity policy.)

The Commission further proposed a policy whereby all commodity restrictions, except those against the transportation of household goods[12] and class A and B explosives, on "general commodities" authority would be considered unduly restrictive and removable. As to territorial limits, the Commission proposed to permit carriers holding less than countywide authority to seek expansion of their authority to the full county.

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[11] The STCC source contains 29 broad generic commodity classifications such as furniture and fixtures, building materials, and petroleum and petroleum products. See the full listing in the Ex Parte No. 55 (Sub-No. 43A) Policy Statement (45 F.R. at 86,807 colm. 1; App. J, 264a).

[12] The household goods restriction was proposed to be retained because it appeared at the time that pending legislation would be enacted which would direct separate licensing of household goods carriers. (See discussion in Ex Parte 55 (Sub-No. 43A), 45 F.R. at 4558; App. I, 205a). Later it became evident that no legislation containing such a provision would be passed and, therefore, there was no reason routinely to impose a restriction against household goods carriage. Accordingly, the Commission did not adopt a policy to exclude household goods (45 F.R. at 86,752 colm. 3; App. H, 155a-156a).

The Commission ultimately adopted guidelines that were largely the same as those initially proposed for broadening commodity descriptions (the tripartite method) and for expanding territorial authorizations (from a single point in a county or city to the entire county or city). The final decision permitted carriers holding general commodity certificates, which had historically been restricted against transportation of household goods, to apply to have that restriction removed. (See footnote 12 *infra*).

The Commission's final decision clearly stated that these policies were in no way binding, but were indeed guidelines only, from which the Commission would depart if the evidence pertaining to a particular application warrants. (See final Section 1137.20 at 45 F.R. 86,759 colm. 1; App. H, 127a-128a).

2. *New Authority Applications*

To encourage applications for more broadly based operating authorities consonant with the pro-competitive policies stressed in the 1980 Act, the Commission proposed a general policy statement, in Ex Parte 55 (Sub-No. 43A) (App. I, 193a-222a) setting forth guidelines for future applications. These guidelines were designed to advise prospective applicants of the territorial and commodity descriptions the Commission normally would regard as sufficiently broad. The Commission proposed to use counties and cities as minimum territorial descriptions,[13] but departing

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[13] The territorial guidelines also provided that if a carrier demonstrates a useful transportation service for the 48 contiguous states the Commission would include authorizations for Hawaii and Alaska in order to stimulate increased transportation services to those States. (45 F.R. at 45,549 colm. 1 last paragraph; App. I, 208a-209a).

from the tripartite commodity classification (see p. 10, *supra*) for restriction removals, proposed only to use the STCC categories for new authorities. (45 F.R. at 45,547; App. I, 200a-203a).

The final policy adopted was substantially similar to the original proposal. As in restriction removals, the Commission stated that because no special household goods licensing legislation was enacted, the agency would not routinely exclude household goods from new grants of authority. (45 F.R. at 86,801 colm. 3; App. J, 240a). The most significant change from the original proposal was that, instead of requiring applicants for new authority to use only the STCC categories for commodity descriptions, the Commission stated that those categories simply would be considered guidelines reflective of the Commission's overall objectives. (45 F.R. at 86,801 colm. 2, last full paragraph; App. J, 239a). This the agency made quite clear (45 F.R. at 86,799 colm. 1, 3; App. J, 229a, 231a):

> The major change from our original proposal is our decision not to prescribe the exact form of commodity descriptions. Instead we shall leave to each applicant the selection of a broad description that it believes will best meet its business requirements.
>
> * * * *
>
> [W]e are not prescribing limited lists of acceptable commodity or geographic descriptions. We are, instead, establishing guidelines for acceptable minima . . . . We will accept reasonably broad commodity descriptions in the future, even if they are not the group used in STCC.

The Commission explained that highly restrictive authorities inhibit the most efficient use of carrier equipment and inappropriately curb competitive ac-

tivity. (45 F.R. at 86,798 colms. 2-3, 226a-227a; and 86,800 colms. 2-3—86,801 colm. 1, 233a-238a; App. J). The agency also indicated that excessively narrow or restrictive certificates increase unnecessarily the costs and burdens of regulation by requiring carriers repeatedly to reapply for minor (and usually unopposed) extensions of authority as their operations grow or change. (*Id.*) In addition, the Commission noted the close relation and the need for consistency between both its future licensing and restriction removal policies. The Commission stated (45 F.R. 86,798 colm. 3; App. J, 227a-228a):

> Logic dicates that, if we take these [restriction-removal] actions for carriers with existing authorities we must also assure that future authorities are not subject to the same defects the Congress perceived in our past practices. It is obvious that competition and efficiency on the scale envisioned by the Congress cannot be achieved if we broaden existing authorities, while continuing to grant narrow authorities. We would thereby create a class of competitively disadvantaged carriers (at least initially), which would be entirely inconsistent with the purposes of the Act.

(Also see 45 F.R. at 86,799 colm. 3; App. J, 231a).

The Commission again emphasized that it was issuing guidelines only, from which it would depart in individual cases if the evidence warranted. It clearly stated (45 F.R. at 86,800 colm. 2, 3rd full paragraph; App. J, 234a):

> [W]hat we propose is not mandatory. If an applicant justifies the use of another reasonably broad description of the authority needed, we will allow that description to be used.

D. The October 1981 Decision

The principal arguments brought before the court of appeals were that the Commission exceeded its statutory mandate by requiring or allowing carriers to obtain overly broad operating authorities, and that the Commission's guidelines were actually binding rules, promulgated in violation of the Administrative Procedure Act (APA).

The Commission maintained that, in outlining commodity and territorial "guidelines" that would "normally" be appropriate, it simply had established rebuttable general policy presumptions. The Commission stressed that an applicant or any protestant could rebut those presumptions by presenting persuasive reasons for narrower authority. Additionally, the Commission maintained that, whether considered as policies or rules, its guidelines complied with the APA because it had utilized formal notice and comment procedures.

Notwithstanding the Commission's assurances to the contrary, the court below concluded that the guidelines were not flexible policy but binding rules. (659 F.2d 452, 464; App. A, 28a-29a). The court doubted that the Commission actually intended to apply the guidelines flexibly.[14] The court perceived "sinews of

[14] The court's conclusion that the agency routinely was forcing unwanted authority on applicants was based on a number of ICC *preliminary* findings in several initial Federal Register notices which expanded the scope of applications for new authority to conform to the guidelines even though each applicant had applied for more limited authority. However, in each proceeding cited by the court (*Id.* 471-72 n.99; App. A, 47a-48a) *no final* agency action had been taken. Similarly, the court cited (*Id.*) two cases "docketed" in the Fifth Circuit in which the Commission had granted applications to eliminate restrictions against the transportation of commodities in bulk. The agency had not yet filed its briefs in either of the cited cases.

command beneath the velvet words" professing flexibility. (659 F.2d at 463, App. A, 27a; and see *Id.* at 471-72, App. A, 47a-49a). As rules, however, the court held they were established properly because the notice and comment requirements of the APA had been satisfied.

The court approved, as patently reasonable, the territorial expansion of authority (in new application or restriction removal proceedings) from a single point in a county or city to embrace the entire county or city. (*Id.* at 468 and 473-74; App. A, 39a and 51a-53a). However, it held it to be error for the Commission automatically to include Alaska and Hawaii in authority to serve the 48 contiguous states. (*Id.* at 474; App. A, 54a).

As to the scope of commodities, the court held that the tripartite categories used by the Commission might be, in certain circumstances, too broad, but were nevertheless "a good start". The court gave no guidance on what it would accept as proper descriptions and left in doubt whether the ones selected by the agency simply did not conform to the court's idea of proper descriptions, or whether the court was holding that the Commission could not have any presumptive commodity descriptions at all (compare *id.* at 465 and 472; App. A, 31a and 49a-50a).

The court further stated that no authority should be granted (whether in a new license or through the broadening of an existing one) unless a carrier has affirmatively demonstrated it is fit, willing, and able to handle all commodities within the categories sought.

The court also held that the Commission should not routinely include in general commodities authority (a) commodities in bulk or (b) household goods, unless the applicant demonstrated a specific fitness,

willingness, and ability to perform those two kinds of services. (*Id.* 469, 475; App. A, 40a-41a, and 56a-57a). It was not clear from the October opinion whether the court was using household goods and commodities in bulk as *examples* of how the Commission should treat all distinct services, or whether the court was holding these two motor carrier services to be more specialized than all others and, therefore, entitled to special treatment. (See *Id.* 465-467; App. A, 32a-38a).

After receiving the October decision, the Commission prepared and implemented, by unanimous vote, internal guidelines directing its staff to take actions necessary to ensure uniform compliance with the Court's mandate as the agency perceived it.[15]

E. The Mandamus Decision

The petitioners below believed that the Commission's subsequent actions did not comply with the court's mandate. In January 1982 they requested the court of appeals to issue a writ of mandamus adopting their view of the requirements of the October decision and ordering agency compliance with the court's mandate as so interpreted. They also sought to have vacated all agency decisions issued since October 1, 1981, that failed to comply with their view of the court's mandate.

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[15] Individual Commissioners differed somewhat in their interpretation of the court's decision. Consequently, no motion for a stay of the issuance of the mandate, petition for rehearing, or petition for certiorari of the October decision was filed by the Commission. The four sitting Commissioners at that time consistently split two-to-two on whether to take any such court actions. Under agency internal operating procedures, a tie in the Commission's votes meant no court action could be taken.

In response, the Commission asked that if the court of appeals disagreed with the agency's interpretation of that decision, it clarify its mandate in order to provide needed guidance. The Commission maintained, however, that (a) mandamus would be an inappropriate remedy, and (b) an appeals court could not engage in a wholesale reversal of Commission decisions that were not before the court under properly filed Hobbs Act review petitions.

On February 25, 1982, the court of appeals entered a mandamus decision (669 F.2d 957; App. C, 63a-82a). The court acknowledged the parties' need for clarification (*Id.* 960-961; App. C, 62a-68a). The court then attempted to clarify every substantive aspect of its October decision. Although much of the clarification consisted of simply reciting selected portions of its October decision, the court did resolve some of the more significant ambiguities, either expressly by new discussion, or by inference from the selection of certain portions of its October decision for quotation.

The court clarified that it was not using bulk commodities and household goods as illustrative examples. Rather, the court held that bulk commodities and household goods were the *only two* carrier services that it considered specialized and warranted special treatment.

The court imposed a new requirement by holding, for the first time, that an applicant in a restriction-removal proceeding *must* demonstrate it is specifically fit, willing, and able to provide the requested expanded service to transport commodities in bulk and household goods. (The requirement may be susceptible to a broader interpretation, *i.e.*, that all applicants in restriction-removal proceedings must affirmatively demonstrate their fitness, willingness, and ability to provide the expanded service. (See the Commission's

request for certiorari in *Interstate Commerce Commission* v. *Steere Tank Lines, Inc., et al.*, S. Ct. No. 81-41, filed July 9, 1982). Otherwise, the carrier must continue to operate under the restrictive authority granted under the 1935 Act.

The court clarified that an applicant does not already have to possess the requisite equipment to demonstrate fitness and ability. Evidence of past successful operations is sufficient to qualify a carrier as fit and able to perform the desired expanded service.

The court also required the Commission to proceed by rulemaking (rather than by adjudication, as the Commission had elected) and to promulgate replacement rules for those invalidated by its October decision "as soon as practicable" (669 F.2d at 964; App. C, 79a). Additionally, the court directed the Commission to publish a Federal Register notice explaining the court's decision, as clarified, and the current decisional standards to be employed beginning Monday, March 8, 1982.

In addition to resolving several of the significant ambiguities outlined above, the court of appeals specifically held as to restriction removals (*Id.* 961-963; App. C, 72a-76a), the Commission may not authorize the elimination of bulk and household goods exceptions from general commodities authority without requiring a special showing that the applicant is fit, willing, and able to transport those commodities. Moreover, quoting from its October decision, (659 F.2d at 464-65) the lower court stated that every applicant must be permitted (*Id.* 962; App. C, 73a-74a):

> 'to seek some other commodity classification if it can show that use of the tripartite Commission standard would require the transportation of commodities unrelated to those previously authorized or would require the institution of a

> different type of service, and that the carrier is not fit or is unwilling or is unable to provide the service.'

The Commission also must provide some opportunity for "opponents" to enter an appearance and express their opposition. (669 F.2d at 962; App. C, 75a).

As to applications for new authority, the Commission must permit applications "for any reasonably broad commodity authority" and it must require a "fit, willing, and able" showing for "the commodities for which authority is sought" (*Id.* 963; App. C, 76a-77a). No grant of bulk service or household goods can be made as part of a general commodities authorization without a special fitness showing. (*Id.* at 77a). Nor can authority to serve Alaska or Hawaii be granted as part of nationwide authority without a specific showing of fitness and need to serve those states. (*Id.*).

The court limited its February mandamus decision to future Commission actions, reserving action on the request that alleged non-complying licenses issued after October 1, 1981 be vacated. On March 30, 1982, the court issued a further decision denying mandamus relief for past Commission decisions (673 F.2d 82; App. E, 89a-98a).

F. The Stay Of The Mandamus Decision

The Commission considered a stay of the mandamus essential to prevent the prospect of contempt sanctions from so chilling its decision-making activities as to foreclose the agency from deciding hundreds of potentially controversial cases. Notwithstanding Justice White's grant of the stay, the Commission is complying with the basic requirements of the October decision. (See 47 Fed. Reg. 13,603-13,604, March 31, 1982; App. L, 311a-316a)

II.

REASONS FOR GRANTING THE PETITION

This case presents the need for a comprehensive review of the newly-enacted Motor Carrier Act of 1980. The Court's ultimate pronouncements on the breadth of the 1980 Act and the extent to which the Commission may act in promoting competition and efficiency in the trucking industry will guide the agency, the industry, the public, and the bench and bar for years to come.

Additionally, the Court is asked to review an appellate court's mandamus decision which would direct an agency's conduct in discretionary, as opposed to ministerial, actions. The mandamus decision not only compels the agency to undertake a rulemaking proceeding, but also directs how the agency shall decide cases during the interim. This Court's decision would provide guidance to all courts on the appropriateness of mandamus to clarify and enforce decisions relating to the full range of agency actions from regulations to adjudications.

A. The Court Is Asked To Review The Entire Controversy

It is a long-standing tenet of Supreme Court practice that a "writ [of certiorari] will not lie until the whole of the matters in controversy in the suit below are disposed of . . . The cause is not to be sent up in fragments." *Holcombe* v. *McKusick*, (U.S.) 20 How. 552, 554 (1858).[16] This practice conserves the

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[16] See *Morgantown* v. *Royal Ins. Co.*, 337 U.S. 254, 258 (1949); *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940); and *Providence Rubber Co.* v. *Goodyear*, (U.S.) 6 Wall. 153 (1868), all discouraging piecemeal litigation on writs of certiorari to the Court.

time, resources, and energy of the litigants and the courts, and promotes the ends of justice.[17]

Accordingly, in appellate cases where a circuit court issues a second decision in the same case, addressed to a party's request for a variance, alteration, expansion or resolution of a genuine ambiguity of the initial determination, and that subsequent decision substantively clarifies, varies, or alters the initial court decision, the 90-day period for filing for a writ of certiorari as to the entire controversy runs from the date of the second decision. *United States* v. *Adams*, 383 U.S. 39 (1966); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 378-84 (1965); *Federal Power Co.* v. *Idaho Power Co.*, 344 U.S. 17 (1952); *Rogers* v. *Hill*, 289 U.S. 582 (1933); compare *FTC* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206 (1952).

In the instant case the mandamus decision was issued expressly for the purposes of clarification, *i.e.*, to resolve genuine ambiguities in the first decision. Thus, the 90-day time period for filing for a writ of certiorari for Supreme Court review of the controversy ran from the date of the clarification. See *FTC* v. *Colgate-Palmolive Co.*, *supra*. As discussed above, the lower court altered, clarified, and varied its mandate by holding: (a) that household goods and commodities in bulk are the only two commodities that should be singled out for special treatment; (b) that the Commission may not proceed by policy statement or adjudication but only by rulemaking to establish motor carrier licensing policies; (c) that ap-

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[17] See *United States* v. *Nixon*, 418 U.S. 683, 690-691 (1974), for the proposition that "finality" and the other rules affecting the appropriateness of petitions for certiorari are not rigid parameters, but are practical doctrines shaped by the equities.

plicants in restriction-removal proceedings must affirmatively demonstrate their fitness, willingness, and ability; and (d) that an applicant can show fitness and ability by evidence of successful past operations instead of possession of equipment and personnel. These holdings were not clear from the October decision.

Thus, the 90-day filing period for certiorari under 28 U.S.C. § 2101(c) ran from the lower court's February 1982 mandamus decision, which addressed the same range of issues as did the October 1981 decision. The entire controversy, the October and February decisions together, is properly reviewable by this Court on this petition for certiorari. As explained below, the issues raised are important and worthy of this Court's review.

B. The Lower Court Intruded Unlawfully Into The Agency's Discretion To Interpret And To Implement The Motor Carrier Act of 1980

This Court has consistently emphasized that the courts must give great deference to the interpretation of a statute by the agency charged with its administration, *especially* in those instances where, as here, the agency (a) is interpreting a new statute for the first time and (b) helped to draft the law. Thus, for example, in *Zuber* v. *Allen*, 396 U.S. 168, 192-193 (1969), this Court stated:

> While this Court has announced that it will accord great weight to a departmental construction of its own enabling legislation, especially a contemporaneous construction, see *Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 801, 13 L. Ed. 2d 616 (1965); *Power Reactor Development Co.* v. *International Union of Elec.*, etc., 367 U.S. 394, 408, 81 S. Ct. 1529, 1536, 6 L. Ed. 2d 924

(1961); it is only one input in the interpretational equation. Its impact carries most weight when the administrators participated in drafting and directly made known their views to Congress in Committee hearings. See *Power Reactor Development Co.* v. *International Union of Elec.*, etc., *supra; United States* v. *American Trucking Assns.*, 310 U.S. 534, 539, 60 S. Ct. 1059, 1061-1062, 84 L. Ed. 1345 (1940). In such circumstances, absent any indication that Congress differed with the responsible department, a court should resolve any ambiguity in favor of the administrative construction, if such construction enhances the general purposes and policies underlying the legislation. See *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 112-114, 67 S. Ct. 133, 145-146, 91 L. ed. 103 (1946).

See also *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1964). Most recently this Court reiterated, in a case bearing striking resemblance to the instant case, that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . ." *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 598 (1981),[18] quoting from *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

Similarly this Court has carefully delineated the appropriate functions of reviewing courts and agencies charged with the administration of economic reg-

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[18] This Court also rejected there (as we ask it to do here, see fn. 8, *supra*) the lower court's reliance on legislative history favorable to its construction while disregarding conflicting, unfavorable legislative history. *FCC* v. *WNCN*, *supra*, 450 U.S. at 598.

ulatory statutes, in a series of decisions commencing with *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).[19] The "guiding principle," as stated in *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952), "is that the function of the reviewing court ends when the error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." Procedures which limit the administrative agency's discretion to reconsider its approach to the problem on remand consistently have been found improper because they "propel the court into the domain which Congress has set aside exclusively for the administrative agency." *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976), quoting from *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). The *Chenery* decision is particularly relevant here because this Court held that it would not have been proper to require an agency to abandon adjudication in favor of rulemaking on remand. These principles have been applied by this Court to proceedings involving the Commission on a number of occasions, most recently in *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries*, 449 U.S. 607 (1981). See also, *United States* v. *Saskatchewan Minerals*, 385 U.S. 94 (1966); *ICC* v. *Atlantic Coast Line RR Co.*, 383 U.S. 576, 601 (1966); *United States* v. *Jones*, 366 U.S. 641, 652 (1949).

Here the lower court transgressed these legal principles. It did much more than merely declare the agency's rules unlawful, explain the legal defects,

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[19] *Pottsville*, it is worth noting, was accepted by this Court following issuance of a writ of mandamus by the Court of Appeals for the District of Columbia Circuit against the Federal Communications Commission.

and remand the proceedings to the Commission. The court directly compromised the demarcation of functions between court and agency by ordering the agency to proceed by rulemaking to establish proper commodity classifications for motor carrier licenses and by instructing the agency to exclude commodities in bulk and household goods unless the applicant demonstrates a special fitness to transport those commodities.[20]

The intrusion by the court of appeals into the agency's province here is particularly harmful because the court misinterpreted the 1980 Act, reading its legislative mandate too narrowly, and by so doing has hamstrung the agency in its attempt to effectively implement the Act. This Court should take this opportunity, at the initial stages of regulation under the 1980 Act, to settle the controversy over the statu-

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[20] Indeed, a basic factual error in the court's ruling on commodities in bulk is that this really is not a separate commodity but rather only a *method* of transporting commodities. (45 F.R. at 86,807 colm. 2 last paragraph; App. J, 266a). The mandate, as clarified, requires the Commission routinely to insert "bulk" restrictions in authorizations of general commodities. General commodities means *all* commodities; and bulk transportation involves the transportation of commodities in such a state that they are fungible, that is, they are either poured, blown, dumped, or shoveled into the truck with the walls of the truck or the trailer forming the container. Thus, a general commodities certificate restricted against the transportation of commodities in bulk would mean, for example, the agency was authorizing a carrier to transport sand *only* in individualized containers, likewise for the transportation of petroleum, sawdust, coal, talc, and chemicals. No open-dump, liquid-bulk, or pneumatic-bulk trucks could be used. This promotes inefficient and incomplete transportation services, compromises the intent of the 1980 Act, and highlights the problems associated with a court of appeals substituting its judgment for that of an agency having the necessary expertise.

tory directives of that Act. We believe that if the Court examines the merits, it will reverse the decisions below and endorse the Commission's decisions as consonant with the 1980 Act. (If it does so, the various problems associated with unwarranted restrictions upon the agency's implementation of the Act need not be resolved.)

The Commission continues to maintain, as it has throughout, that the guidelines it issued were not only within the mandate of the Motor Carrier Act of 1980, but would rationally achieve the objectives of that Act. The guidelines unquestionably foster broader, more complete authorities and promote competition. The court of appeals concluded, however, that the Commission went too far in promoting those goals, creating policies favoring overly broad grants of authorities. This holding misconstrues the fundamental purpose of the 1980 Act and the Commission's actions in the two proceedings. Compare the Fifth Circuit's decision in this case with the recent decisions of the Eleventh Circuit in *Refrigerated Transport Co., Inc.* v. *ICC*, 673 F.2d 1196 (11th Cir. April 19, 1982), and a different panel of the Fifth Circuit in *Central Freight Lines, Inc.* v. *United States*, 669 F.2d 1063 (5th Cir. 1982).

The Commission's actions certainly promote more efficient use of energy resources, as well as carrier equipment.[21] Expanded authorities will also enable carriers to offer more complete service to shippers.[22]

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[21] The 1980 Act directs the Commission to promote more efficient use of equipment and energy resources. 49 U.S.C. §§ 10101(a)(7)(D); 10922(h)(i)(v); and 10922(h)(2).

[22] The 1980 Act directs the Commission to promote more responsive service to shippers' needs by, among other things, allowing a wider variety of service options. 49 U.S.C. §§ 10101(a)(1)(7)(A) and (B).

Thus, the Commission's actions are harmonious with the 1980 Act and this Court should take this opportunity to affirm the procompetitive mandate of that Act as manifested in the Commission's policy guidelines.

C. The Lower Court Improperly Used Its Mandamus Power To Address Discretionary Agency Functions And To Resolve Ambiguities In Its Earlier Decision

This Court has held that the prerequisites for mandamus are appropriately heavy and that this extraordinary writ should "*hardly* ever!" be issued by an appellate court. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980). The Court requires two basic findings by a court of appeals: (1) that no alternative adequate remedy exists; and (2) that petitioners' asserted right to mandamus is "clear and indisputable." *Id.* 35-36; *Will* v. *United States*, 389 U.S. 90 (1967); *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379 (1953). The use of mandamus in this case was wholly inappropriate in several respects.

First, a fundamental prerequisite to the issuance of a mandamus order of this type is a finding that the agency is in fact not complying with the court's mandate. Clearly, the availability of alternative remedies need never be addressed if no violation of the mandate has occurred.

In its February decision the Fifth Circuit concluded only that it "appeared" that the Commission might be violating its mandate and that "if" the Commission were not in compliance, the potential for future litigation would be great. In other words, the court of appeals was not sure if any violation had occurred, but in case there might be violations, the court decided to mandamus the Commission anyway.

Although we welcome the court of appeals' resolution of many of the ambiguities in its October decision, we contend now, as we did before, that clarification by way of a writ of mandamus is highly inappropriate. The Commission cannot be found to have knowingly violated a mandate that was unclear and with which the agency attempted good faith compliance.

Second, it is well settled that a court can only mandamus ministerial duties. That is to say, the court of appeals could have ordered the Commission to decide operating rights cases, but it could not order the Commission to either grant or deny the applications in a specified manner—that is a discretionary matter committed to the agency's expert judgment. It cannot mandamus the final discretionary results. See, *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). As explained, in *Richardson* v. *United States*, 465 F.2d 844, 849 (3d Cir. 1972):

> An act is ministerial only when its performance is positively commanded and so plainly prescribed as to be free from doubt.

This Court has long recognized the Commission's broad discretion in licensing. See *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65 (1945). Clearly, the issues involved here—whether to grant authority to serve Alaska or Hawaii, or to haul commodities in bulk, or household goods—are matters entrusted to the sound judgment and discretion of the Commission. Under these circumstances, mandamus definitely is not "clear and indisputable" or "free from doubt." *Bankers Life & Cas. Co.* v. *Holland*, *supra*, 346 U.S. at 384. As this Court determined in

Allied Chemical Corp. v. *Daiflon, Inc., supra*, 449 U.S. at 36:

> Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable'.

The lower court's February mandamus decision should be compared with its subsequent determination, in its March decision (denying mandamus relief as to past Commission decisions) that the prerequisites for mandamus were not established, *i.e.*, petitioners below had failed to show that no alternative remedies were available and that they had a "clear and indisputable" right to the mandamus relief requested. (App. E, 98a). The two decisions cannot be squared. Surely, if the prerequisites for mandamus were not met as to the prior Commission decisions (in which the time for participating in agency proceedings and filing Hobbs Act petitions for review almost assuredly had expired), they definitely have not been met as to all future proceedings.

Third, because the February mandamus order runs to all future licensing proceedings, the mandamus order is defective for overbreadth. As the court held in its March 1982 decision denying mandamus for past actions (*American Trucking Associations, Inc.* v. *Interstate Commerce Commission*, 673 F.2d 82, 85-86 (5th Cir. 1982) (App. E, 87a-98a).

> Congress has not localized appeals from ICC orders as it has done in the case of those administrative appeals for which it desired uniform review. [footnote omitted] We should not arrogate the decision making authority meant to be exercised by other circuits.

Finally, the February decision abridges unlawfully the Commission's discretion to proceed by adjudica-

tion or policy statement, as opposed to rulemaking. The court ordered the agency to promulgate "replacement" rules for those it invalidated. The court's action here would summarily foreclose the Commission from pursuing the same regulatory objectives by other methods. In so doing, it again oversteps its proper function as a reviewing court.

The decision, we submit, should be reviewed by this Court to give additional guidance to lower courts on the proper use of a writ of mandamus.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1982

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82-86

No. 86

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
RESPONDENTS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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* A further extension was granted on July 9, 1982, in No. A-976 to and including July 16, 1982. At the time of this printing no formal document was available for inclusion in the Appendix.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT *
UNIT A

No. 81-4026

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION and the UNITED STATES OF AMERICA, RESPONDENTS

Oct. 1, 1981

As Corrected on Denial of Rehearing
Oct. 23, 1981

Petition was filed seeking review of Interstate Commerce Commission rules and policy statements dealing with removal of restrictions from existing motor carrier authority and the issuance of new motor carrier authority. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) guidelines were rules subject to judicial review; (2) rules broadening all carrier authority to cover all commodities in the same group as the particular commodities for which a carrier had authority were unreasonable; (3) rules authorizing general commodity carriers to carry bulk commodities and household goods were unreasonably broad; (4) rules permitting carriers with authority to a particular community to serve the entire county in which the community lies were reasonable; and (5) Commission was not engaged in master licensing.

Remanded.

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

Opinion on Motion to Bear Costs, 666 F.2d 167.

1. Carriers [Key] 4

"Common carriers" include those who carry general freight, specialized goods and household goods; "contract carriers" enter into continuing contract with particular shippers and provide service and equipment to meet those special needs. Revised Interstate Commerce Act, 49 U.S.C.A. § 10102(13).

See publication Words and Phrases for other judicial constructions and definitions.

2. Statutes [Key] 181(2), 190

Court should depart from official text of the statute and seek extrinsic aids to its meaning only if the language is not clear or if apparent clarity of language leads to absurdity of result when applied.

3. Commerce [Key] 85(2)

In determing whether rules and guidelines of the ICC were within the discretion imparted to it by statute, court could consider not only the statements of the ICC but also its implementing actions, as the true test of the word is the deed.

4. Commerce [Key] 116

Procedure followed by the Interstate Commerce Commission in adopting its statement on removal of restrictions from authorities of motor carriers under which notice of the application for restriction removal will be published in the Federal Register and there will be 25 days for written comments, but under which there will be no oral hearings or opportunity for submission of evidence did not violate the requirements of the Administrative Procedure Act in view of Motor Carrier Act provision that regulations need

not provide for oral evidentiary hearings. 5 U.S.C.A. §§ 554, 556, 557; Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(h)(2).

5. Administrative Law and Procedure [Key] 385

In the absence of constitutional constraints or extremely compelling circumstances, administrative agencies should be free to devise their own rules of procedure and methods of inquiry designed to help discharge their multitudinous duties.

6. Administrative Law and Procedure [Key] 419

Policy statement is in reality a binding rule unless it acts only prospectively and it generally leaves the agency and its decision makers free to exercise discretion.

7. Commerce [Key] 85.28(1)

Policy statement of the Interstate Commerce Commission dealing with removal of restrictions from motor carrier authorities was a rule and would have to be evaluated as such in view of the fact that the statement led all applicants toward only one course with respect to the expansion of commodities which a particular carrier would haul.

8. Status [Key] 219(1)

When Congress gives an administrative agency the primary responsibility for interpreting a statutory term, the reviewing court may not set aside the regulations promulgated by the agency just because the court would have interpreted the term in a different manner.

9. Commerce [Key] 85.28(4)

Determination of the Interstate Commerce Commission to use the Standard Transportation Commodities

Code categories, the commodities definition set forth in the descriptions in motor carrier certificates and other descriptions previously recognized by the Commission as a starting point for expansion of carrier authority was not unreasonable but the constraint of the Commission that every applicant seek equally broad authority, without regard to whether it desired to or had the ability to carry all of the commodities which would be covered within the particular category, was not reasonable. Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(h)(1).

10. Commerce [Key] 85.28(4)

Provision of Interstate Commerce Commission statement regarding removal of restrictions on motor carrier authorities which considered restrictions on the authority to carry general commodities including bulk service restrictions to be unduly restrictive exceeded the Commission's authority to reasonably broaden the categories or property authorized by a carrier certificate or permit as the indication of the Commission that it would routinely grant authority to carry bulk commodities to all applicants requesting general commodities authority exceeded the Commission's statutory duty to issue certificates only to persons fit, willing, and able to provide the transportation authorized by the certificate. Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(b)(1)(A), (h)(1)(B)(i).

11. Commerce [Key] 85.28(4)

It was unreasonable for Interstate Commerce Commission in issuing statement concerning removal of restrictions on motor carrier authority, to permit all general commodities carriers to perform household goods transportation without any further demonstra-

tion of fitness, willingness, and ability to perform such service. Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(b)(1)(A), (h)(1)(B)(i).

12. Commerce [Key] 85.28(4)

It was reasonable for Interstate Commerce Commission, in issuing statement on removal of restrictions on carrier authority, to provide that carriers whose certificates were restricted to an area less extensive than a county could seek expansion to all points in the county in which any authorized service point was located and could seek expansion of any service point located within a given city to the city and its commercial zone. Revised Interstate Commerce Act, § 10922(h)(1)(B)(iv).

13. Commerce [Key] 85.28(4)

Interstate Commerce Commission was not authorized, in implementing policies of the Motor Carrier Act to grant new applicants for motor carrier certificates, to issue certificates only for all goods within certain broad categories. Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(b).

14. Commerce [Key] 85.27(1)

Motor Carrier Act continues to require the Interstate Commerce Commission to exact in the future, as it has in the past, the showing of at least general fitness, willingness and ability to perform services authorized by the certificate. Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(b)(1).

15. Commerce [Key] 85.27(1)

Policy statement of the Interstate Commerce Commission with respect to new motor carrier certificates of authority was adopted in compliance with the pro-

cedural requirements of the Administrative Procedure Act for rule making. 5 U.S.C.A. § 553.

16. Commerce [Key] 85.28(4)

In view of statement of the Interstate Commerce Commission in a statement concerning grant of new motor carrier certificates that it would prescribe the use of certain commodity descriptions, discourage the use of deviations from specific lists, and require justification for proposed deviations, the announcement was a rule and would be subject to judicial review accordingly.

17. Commerce [Key] 85.28(4)

Interstate Commerce Commission could not require all applicants for new motor vehicle carrier authority to fit set descriptions of the type of commodities which they would carry and could not assume that an applicant who was fit, willing, and able to carry one commodity in a particular classification would be fit, willing, and able to carry all commodities in that classification. Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(h)(1).

18. Commerce [Key] 85.28(4)

Interstate Commerce Commission exceeded its statutory mandate by granting bulk commodity authority to carriers who could not demonstrate that they were fit, willing, and able to provide the bulk transportation authorized by a certificate, especially to carriers who did not have the required specialized equipment or proper cleaning facilities. Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(b)(1)(A).

19. Commerce [Key] 85.28(4)

Grant of ICC new motor carrier authority to transport household goods must be excepted from new gen-

eral commodities authority unless the applicant demonstrates fitness, willingness and ability to render that service. Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(b)(1)(A).

20. Commerce [Key] 85.28(3)

Interstate Commerce Commission's decision not to limit new motor carrier authority to one point but to embrace a geographic area no smaller than a county was reasonable. Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(b)(1).

21. Commerce [Key] 85.28(3)

It was unreasonable for Interstate Commerce Commission to include Alaska and Hawaii automatically in all certifications if the applicants justify a need for service in the 48 contiguous states. Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(b)(1).

22. Commerce [Key] 85.27(2)

Interstate Commerce Commission may consider evidence other than shipper support or presently moving traffic in determining to grant new motor carrier authority; ICC may consider traffic studies or anticipated future movements and must weigh the need or demand for new services, innovative quality or price options, increased competition, or greater fuel efficiency, improved service for small communities, improved opportunities for minorities, and other benefits which would serve a useful purpose. Revised Interstate Commerce Act, 49 U.S.C.A. § 10101(a)(7).

23. Commerce [Key] 85.27(2), 108

Interstate Commerce Commission can grant new motor carrier authority based on representative evidence; grant of statewide authority does not need

support from all, or even most of municipalities in the state; all that is required is support from a representative number of municipalities in the state.

24. Commerce [Key] 85.27(2)

Interstate Commerce Commission, by making findings of need for service by each applicant for new motor carrier authority in accord with procedures and standards affirmatively stated in the Motor Carrier Act, is not engaged in master licensing. Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(b)(3).

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Phinney, Hallman, Pulley & Coke, Leroy Hallman, Dallas, Tex., for Frozen and Southwestern.

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James M. Doherty, Austin, Tex., for Moss Trucking Co.

Alan E. Serby, Atlanta, Ga., for Brannan, Owen, Refrigerated and Motor Carrier Lawyers Assoc.

Keith G. O'Brien, Edward K. Wheeler, Washington, D.C., for International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers.

Eugene C. Ewald, Bloomfield Hills, Mich., for National Auto. Transporters.

Petition for Review of Orders of the Interstate Commerce Commission

Before RUBIN, RANDALL and TATE, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Responding promptly to the enactment of the Motor Carrier Act of 1980, the Interstate Commerce Commission adopted rules and a policy statement dealing with applications to broaden the definition of commodities that could be carried and the territory that could be served by carriers under existing operating authorities. In addition, the Commission issued a policy statement dealing with grants of operating authority to new applicants. These ICC actions are challenged by the trade associations whose members are affected, a union whose members drive the trucks operated by carriers affected by the changes, and by a number of individual firms.[1]

The adversarial process leads to the positioning of counsel at extremes. Those who object to the Com-

[1] Exclusive jurisdiction to review an ICC rule, regulation or order is in the Court of Appeals. 28 U.S.C.A. §§ 2321(a), 2342(5) (1978 & West Supp. 1981). *See id.* § 2344 (review of orders).

mission's two pronouncements attack them as total arrogations of legislative authority. The Commission, however, defends every line of its attempt to frame a new transportation policy. Cognizant of the statute's generality, the scope of the two statements, and the importance of the new policy to the industry, its employees, and the national economy, we have not attempted to assess these two statements on the broad all-or-nothing basis urged by advocates doing no more than what they perceive to be their appointed role; instead we have measured the specifics of the statements against the statute, taking always into account the deference due the Commission as a result both of its experience and the congressional delegation of authority to it.

After full review of the Commission's actions, we conclude that its procedural rules conform to the requirements of the Administrative Procedure Act, that its policy statements are rules clad in advisory garb, and that some of these rules lie within the Commission's discretion but others transgress its statutory mandate. We, therefore, remand to permit the Commission to enact rules that do not exceed the statutory bounds. Because of the length of this opinion, we set forth an outline in the footnote to facilitate reference to parts of the opinion.[2]

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[2] I. THE MOTOR CARRIER ACT OF 1980 page 457
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[Footnote continued on page 11a]

I. THE MOTOR CARRIER ACT OF 1980

[1] The Motor Carrier Act of 1980 [3] became effective on July 1, 1980. After notice and opportunity for comment the Commission issued a policy statement entitled "Acceptable Forms of Requests for Operating Authority," [4] relating entirely to new applications for authority. Ex Parte No. 55 (Sub-No.

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[3] [Continued]

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SUMMARY page 475

[3] Pub. L. No. 96-296, 94 Stat. 793 (1980) (hereafter cited as the Motor Carrier Act).

[4] The statement covered both certificates to operate as a common carrier and permits to operate as a contract carrier. Common carriers include those who carry general freight, specialized goods and household goods. Contract carriers (defined in 49 U.S.C.A. § 10102(13)) enter into continuing contracts with particular shippers and provide service and equipment to meet those special needs. H. Rep. No. 1069, 96th Cong., 2d Sess. 2, *reprinted in* [1980] U.S. Code Cong. & Ad. News 2283, 2284. The American Trucking Association

43A).[5] On the same day, the Commission announced rules and guidelines for filing restriction removal applications. "Removal of Restrictions From Authorities of Motor Carriers of Property," Ex Parte No. MC-142 (Sub-No. 1).[6] For convenience we will refer to the policy statement concerning new applications as the New Certificate Statement, and to the rules and guidelines for removing restrictions from existing certificates as the Restriction Removal Statement.

The attacks on these announcements have two major predicates: the ICC exceeded its statutory authority by requiring or permitting carriers to obtain overly broad operating authority, and the Commission's announcements, whether rules or policy statements, were promulgated in violation of the Administrative Procedure Act, 5 U.S.C. § 500, et seq. To understand these challenges, it is necessary to review the legislative background.

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directed its arguments to this court to common carrier certificates, but certain intervenors attacked the provisions relating to contract carrier permits as well. Although we refer in this case only to common carrier certificates, the regulations and policy statements concerning contract carriers permits, 49 U.S.C.A. § 10923, are similarly affected by our analysis and conclusions.

[5] 45 Fed. Reg. 86,798 (effective Dec. 31, 1980). *See also* the partial dissenting opinion of Commissioner Clapp, 46 Fed. Reg. 2,296 (Jan. 8, 1981). The Commission issued notice of this proposed policy statement in the federal register just two days after the Motor Carrier Act became law. 45 Fed. Reg. 45,545 (July 3, 1980).

[6] 45 Fed. Reg. 86,747 (effective Dec. 28, 1980). This rulemaking was instituted in September, 1980, by publication of the proposed rules in the Federal Register. 45 Fed. Reg. 61,326 (Sept. 16, 1980).

1.1 LEGISLATIVE BACKGROUND

Before 1935, the Supreme Court had held that the Commerce Clause barred the states from requiring licenses for interstate motor carriage[7] except for safety purposes.[8] By the time of the depression, the trucking industry was described as anarchic, beset by operators who lacked training, finances, and scruples. The depression accentuated the problem with cheap labor, trucks, and fuel available for new ventures. Many states, carriers, customers, and political observers, therefore, sought federal regulation of interstate motor carriers.[9]

The Motor Carrier Act of 1935[10] was designed to bring stability to the industry under the "restraining hand" of the federal government[11] by requiring carriers to obtain licenses—certificates of public convenience and necessity for common carriers and permits for contract carriers—as conditions precedent to instituting any service. The federal government could thus control the number of competing carriers and would have continuing jurisdiction over them to insure that they provided safe and responsive service. *See United States* v. *Drum*, 368 U.S. 370, 374-375, 82 S.Ct. 408, 410-11, 7 L.Ed.2d 360, 363-64 (1962).

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[7] *Buck* v. *Kuykendall*, 267 U.S. 307, 45 S.Ct. 324, 69 L.Ed. 623 (1925); *George W. Bush & Sons Co.* v. *Maloy*, 267 U.S. 317, 45 S.Ct. 326, 69 L.Ed. 627 (1925).

[8] *Bradley* v. *Public Utils. Comm'n*, 289 U.S. 92, 53 S.Ct. 577, 77 L.Ed. 1053 (1933).

[9] Kauper, State Regulation of Interstate Motor Carriers, 31 Mich. L. Rev. 1097, 1111 (1933).

[10] Motor Carrier Act, ch. 498, 49 Stat. 543 (1935).

[11] S. Rep. No. 482, 74th Cong., 1st Sess. (1935); H.R. Rep. No. 1645, 74th Cong., 1st Sess. (1935).

After more than forty years of regulation Congress undertook an intensive study of motor carrier regulation because of the continuing growth of the industry, its development of techniques to deal with regulation, the consequent burgeoning of anticompetitive practices, and the wastefulness of its restrictive practices.[12] For more than eighteen months the House Committee on Public Works and Transportation studied what it called "one of the most complex issues" it had ever considered.[13] For more than a year the Senate Committee on Commerce, Science, and Transportation conducted what it described as "one of the most intensive inquiries" it had ever conducted.[14] Both committees recommended the adoption of a new transportation policy. Their recommendations resulted in passage of the Motor Carrier Act.

The Motor Carrier Act was adopted as "part of the continuing effort by Congress to reduce unnecessary regulation by the Federal Government."[15] It

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[12] The Motor Carrier Act of 1980 was passed to revise the outdated federal regulation of the motor carrier industry. Motor Carrier Act, *supra* note 3, at § 3 (also at 49 U.S.C.A. § 10101 note (West Supp. 1981)). Congress noted the evils the Motor Carrier Act was designed to correct: "[H]istorically the existing regulatory structure has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the trucking industry; that protective regulation has resulted in some operating inefficiencies and some anticompetitive pricing." *Id.*

[13] H.R. Rep. No. 1069, 96th Cong., 2d Sess. 1, *reprinted in* [1980] U.S. Code Cong. & Ad. News 2283.

[14] S. Rep. No. 641, 96th Cong., 2d Sess. 2 (1980).

[15] Motor Carrier Act, *supra* note 3, at § 2 (also at 49 U.S.C.A. § 10101 note (West Supp. 1981)).

declares that the national policy concerning transportation by motor carriers is "to promote competitive and efficient transportation services." [16] The goals of the national transportation policy include "meeting the needs of shippers, receivers, and consumers; allowing price flexibility; encouraging greater efficiency, particularly in the use of fuel; and providing service to small communities." [17] The Act purposely gives the Commission "explicit direction for regulation of the motor carrier industry and well-defined parameters within which it may act pursuant to congressional policy." [18] Furthermore, the statute admonishes the Commission that it "should not attempt to

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[16] Motor Carrier Act, *supra* note 3, at § 4 (codified at 49 U.S.C.A. § 10101(a)(7) (West Supp. 1981). The national transportation policy dealing with motor carriers is stated in 49 U.S.C. § 10101:

> (7) with respect to transportation of property by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers; (F) improve and maintain a sound, safe, and competitive privately-owned motor carrier system; (G) promote greater participation by minorities in the motor carrier system; and (H) promote intermodal transportation.

[17] H.R. Rep. No. 1069, *supra* note 13, at 3, *reprinted in* [1980] U.S. Code Cong. & Ad. News, at 2285.

[18] Motor Carrier Act, *supra* note 3, at § 3.

go beyond the powers vested in it by the Interstate Commerce Act and other legislation enacted by Congress." [19] Moreover, "resulting changes should be implemented with the least amount of disruption to the transportation system consistent with the scope of the reforms enacted." [20]

1.2 INTERPRETATION OF THE MOTOR CARRIER ACT

[2] All of the issues in this case turn on interpretation of the Motor Carrier Act. The parties impart different meanings to even its clearest terms and buttress the nuances they find by resorting to legislative history. Here, as in every case involving statutory construction, the starting point is the language of the statute itself. *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330, 98 S.Ct. 2370, 2375, 57 L.Ed.2d 239, 246 (1978). If the statutory words are clear, there is neither need nor warrant to look elsewhere. *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 492, 67 S.Ct. 798, 793, 91 L.Ed. 1040, 1050 (1947); *Glenn* v. *United States*, 571 F.2d 270, 271 (5th Cir. 1978). Congress adopted and the President signed only the act itself. The reports of committees and the congressional debates did not become law. A court should depart from the official text of the statute and seek extrinsic aids to its meaning only if the language is not clear, *United States* v. *Missouri Pac. R.R. Co.*, 278 U.S. 269, 278, 49 S.Ct. 133, 136, 73 L.Ed. 322, 376-77 (1929), or if apparent clarity of language leads to absurdity of result when applied, *United States* v. *American Trucking Ass'ns*,

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[19] *Id.*

[20] *Id.*

310 U.S. 534, 543-544, 60 S.Ct. 1059, 1063-64, 84 L.Ed. 1345, 1350-51 (1940).

The need for caution in relying on legislative commentary is exemplified by the legislative history of this Act. The House and the Senate Bills differed significantly. The final statute reflects in most respects the provisions of the House Bill, but, in the debate that preceded final passage, various members of each house attributed different meanings to its provisions. In some instances, these remarks were made after the committees of each house had reported, in an effort designed apparently to impress constitutents or influence judicial interpretation, rather than advocate passage, for the remarks were merely inserted into the Congressional Record.[21] The legislative debate, therefore, is both a conflicting and an unreliable guide to congressional purpose, for on most of the issues of statutory purpose involved here, authority can be found to favor any of several interpretations. We rely, therefore, on the statutory language, influenced, when its mandate is not clear, by reports of the Senate and House Committees.

[3] There is no doubt that the Motor Carrier Act, while continuing the policy of industry regulation, was designed to change the Commission's authority and the operating practices of the industry. Congress desired to reduce, but not to eliminate regulation.[22]

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[21] 126 Cong. Rec. S8,480 (daily ed. June 16, 1980) (Statement of Senator Bayh: "It is my understanding, however, that the colloquys did not actually take place. Rather, these statements were inserted in the *Record* as though read.").

[22] H.R. Rep. No. 1069, *supra* note 13, at 3, *reprinted in* [1980] U.S. Code Cong. & Ad. News, at 2285; S. Rep. No. 641, *supra* note 14, at 1-2 ("The bill represents a middle ground between continuing the status quo, on the one hand, and total deregulation on the other hand.").

The statute gives the Commission new directions and requires it to implement new policies. The two Commission promulgations responded to the statutory mandate to replace narrow, highly specific certificates with broader provisions. We consider whether its rules and guidelines are within the wide discretion imparted to it by the statute, or whether, on the other hand, they exceed or transgress the congressional mandate. In doing so, we consider not only the Commission's statements but also its implementing actions, for the true test of the word is the deed.[23]

II. RESTRICTION REMOVAL

2.1 STATUTORY FRAMEWORK

Section 6 of the Motor Carrier Act deals with the removal of operating restrictions from existing certificates.[24] Congress believed that many of these re-

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[23] "[T]he duty of a reviewing court [is] to determine whether the course followed by the Commission is consistent with its mandate from Congress." *Atchison, T. & S.F. Ry. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 806, 93 S.Ct. 2367, 2374, 37 L.Ed.2d 350, 361 (1973). In each of the following cases, the court, in evaluating a challenge to a statute or regulation, considered the actual agency practice under the challenged provision. *American Bus Ass'n* v. *United States*, 627 F.2d 525, 530 (D.C. Cir. 1980); *Citizens Communications Center* v. *Federal Communication Comm'n*, 447 F.2d 1201, 1206 (D.C. Cir. 1971) (that the policy statement "has *in fact* served to deter the filing of a single competing application . . . in over a year is perhaps the most compelling factor in the court's decision to review this dispute at this time" (emphasis supplied)); *see also Morton* v. *Ruiz*, 415 U.S. 199, 213, 94 S.Ct. 1055, 1063, 39 L.Ed.2d 270, 281 (1974).

[24] The full text of this section, 49 U.S.C.A. § 10922(h)(1) (West Supp. 1981), is:

> (h)(1) Not later than 180 days after the date of enactment of this subsection, the Commission shall—

strictions served little or no public purpose; they often resulted in operating inefficiencies and wasted

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(A) eliminate gateway restrictions and circuitous route limitations imposed upon motor common carriers of property; and

(B) implement, by regulation, procedures to process expeditiously applications of individual motor carriers of property seeking removal of operating restrictions in order to—

(i) reasonably broaden the categories of property authorized by the carrier's certificate or permit;

(ii) authorize transportation or service to intermediate points on the carrier's routes;

(iii) provide round-trip authority where only one-way authority exists;

(iv) eliminate unreasonable or excessively narrow territorial limitations; or

(v) eliminate any other unreasonable restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest.

(2) The regulations promulgated by the Commission pursuant to paragraph (1)(B) of this subsection shall provide for final Commission action upon an application not later than 120 days after the date the application is filed with the Commission, except that in extraordinary circumstances, the Commission may extend such deadline for a period of not to exceed 90 additional days. Such regulations shall also provide for notice and the opportunity for interested parties to comment, but need not provide for oral evidentiary hearings. In granting or denying applications under paragraph (1)(B) of this subsection, the Commission shall (A) consider, among other things, the impact of the proposed restriction removal upon the consumption of energy resources, potential cost savings and improved efficiency, and the transportation policy set forth in section 10101(a) of this title, and (B) give special consideration to providing and maintaining service to small and rural communities and small shippers.

fuel because carriers frequently were prevented from providing service by way of the most direct routes and were required to travel circuitous routes or by way of "gateways." In addition, carriers were sometimes subject to "excessively narrow limitations" on the types of commodities they could transport and the territories they could serve. They were prohibited from serving intermediate points on their routes or required to return empty to their originating points because they had only one-way authority to certain markets.[25] Congress, therefore, required the Commission to eliminate gateway restrictions and circuitous route limitations within 180 days, to permit carriers to offer service to intermediate points, to provide round-trip authority, and, in addition, to "implement, *by regulation*, procedures to process expeditiously applications of individual motor carriers . . . seeking removal of operating restrictions in order to . . . *reasonably broaden* the categories of property authorized by the carrier's certificate or permit," and to "eliminate *unreasonable or excessively narrow* territorial limitations." [26]

2.2 RESTRICTION REMOVAL STATEMENT: APPLICATION PROCEDURE

The Restriction Removal Statement contains three parts: general background information, *rules* to govern the restriction removal procedure, and *guidelines* for applicants for restriction removal.[27] The restric-

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[25] H.R. Rep. No. 1069, *supra* note 13, at 17-18, *reprinted in* [1980] U.S. Code Cong. & Ad. News. at 2299-2300; *see* S. Rep. No. 641, *supra* note 14, at 7.

[26] 49 U.S.C.A. § 10922(h)(1)(B) (emphasis supplied).

[27] The general background information is found at 45 Fed. Reg. 86,747-57 (1980). The rules are found in *id.* at 86,757-

tion removal procedure requires that notice of the application for restriction removal be published in the Federal Register.[28] Written comments by interested persons may then be filed with the Commission within twenty-five days.[29] The Commission will consider the application itself and any written comments received. There will be "neither oral hearings nor the opportunity for the submission of evidence under modified procedure."[30] In January 1981, the Commission established the Special Restriction Removal Employee Board to which it delegated the initial decision-making function on restriction removal applications.[31]

[4] This procedure does not violate the requirements of the Administrative Procedure Act (APA). A formal adversary proceeding on the record, as specified in APA sections 554, 556, and 557,[32] is not required. The Motor Carrier Act states that the regulations to be adopted must "provide for notice and the opportunity for interested parties to comment, *but need not provide for oral evidentiary hearings*." 49 U.S.C. § 10922(h)(2) (emphasis supplied). The dispensation of oral hearings does not imply a

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59 (to be codified in 49 C.F.R. §§ 1002, 1137.1-1137.15). The "*Guidelines* for Determining Applications" are found in *id.* at 86,759-60 (to be codified in 49 C.F.R. § 1137.20-29) (emphasis supplied).

[28] *Id.* at 86,758 (1980) (to be codified in 49 C.F.R. § 1137.11).

[29] *Id.* (to be codified in 49 C.F.R. § 1137.12).

[30] *Id.* (to be codified in 49 C.F.R. § 1137.14(a)).

[31] 46 Fed. Reg. 3,532 (1981) (to be codified in 49 C.F.R. § 1011.6(1)).

[32] 5 U.S.C. §§ 554, 556, 557.

requirement of evidentiary hearings based on written submissions. The Commission correctly observed: "the terms of the statute call for informal adjudicatory procedures of the type ordinarily employed in rulemaking proceedings, rather than procedures used in conventional adversary licensing proceedings."[33] This does not dispense with adjudication: it expressly requires informal adjudicatory procedures but analogizes the process of submitting applications and opposing statements to the procedure used in rulemaking.

The Commission's interpretation is undoubtedly influenced by the time constraints placed on it by the statute. The Act specifically instructs the Commission to dispose quickly of restriction removal applications, and requires "final Commission action upon an application not later than 120 days after the date the application is filed" except in extraordinary circumstances.[34] Because there are now some 20,000 carriers holding approximately 500,000 certificates, the number of applications for restriction removal may be tremendous. The Commission must devise procedures to perform the task imposed on it within the time allowed.

[5] Further, the procedure devised by the Commission is consistent with general principles of administrative law. In the absence of "constitutional constraints or extremely compelling circumstances," administrative agencies should be free to devise their own rules of procedure and methods of inquiry designed to help them discharge their multitudinous duties. *Vermont Yankee Nuclear Power Co.* v. *Natu-*

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[33] 45 Fed. Reg. 86,747, 86,749 (1980).

[34] 49 U.S.C.A. § 10922(h)(2) (West Supp. 1981).

ral Resources Defense Council, Inc., 435 U.S. 519, 543, 98 S.Ct. 1197, 1211, 55 L.Ed.2d 460, 479 (1978).[35] The procedural rules formulated by the Commission provide notice and an opportunity to be heard by written comment. It appears to afford at least the minimum procedural rights expressed in the Act. *See Vermont Yankee*, 435 U.S. at 545-49, 98 S.Ct. at 1212-1214, 55 L.Ed.2d at 480-82.

While it is possible that the Commission could, under the Restriction Removal procedure, unduly abridge a party's procedural rights in a particular case, we are not now presented with such a situation. We, therefore, decline to hypothesize such possible consequences of the rules should they be so applied. *See American Trucking Ass'ns, Inc.* v. *United States*, 627 F.2d 1313, 1318, 1327 (D.C. Cir.1980).

2.3 COMMODITIES

The Motor Carrier Act requires the Commission to establish a procedure, on application of individual motor carriers, "to *reasonably* broaden the categories of property authorized." 49 U.S.C.A. § 10922(h)(1) (emphasis supplied). Much is, therefore, entrusted to Commission discretion. After forty-five years of regulatory experience, the Commission is presumably qualified to determine the appropriate breadth of the categories. Yet the statute does limit the broadening to what is reasonable. This fetters the Commission's

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[35] *See also American Farm Lines* v. *Black Ball Freight Serv.*, 397 U.S. 532, 539, 90 S.Ct. 1288, 1292, 25 L.Ed.2d 547, 553 (1970) (an administrative agency may mold its procedural rules for the orderly transaction of business in the manner required to achieve justice in a given case, and such action is not reviewable unless the complaining party makes a showing of substantial prejudice).

discretion and exacts judicial review to determine whether its action is reasonable.

What the Commission considers a "reasonable" broadening of commodities descriptions is described in the second part of the Restriction Removal Statement labeled "Guidelines." [36] Carriers presently holding authority to transport one or more specifically named commodities or a limited class of commodities may broaden their authority to permit them to transport the entire class or classes of commodities of which the named commodity constitutes part.[37] The applicable class must, however, be chosen by the carrier from one of three different sources.[38]

This requirement makes it likely that a carrier with authority to transport only one commodity who desires to transport only one additional commodity would be required to seek authority for an entire class of commodities, some of which the carrier may not wish to transport or may lack the ability to transport. Responding to the concern expressed by those opposing adoption of these procedures that, in the consideration both of applications for removal of restriction and of those for new operating authority, the certificates might authorize service that the carrier is unable or unwilling to provide, the Commission issued a notice of proposed rulemaking expressly dealing with "the interaction of broad certificate grants with the perception that a common carrier's holding out must inevitably be defined by the author-

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[36] 45 Fed. Reg. 86,747, 86,759 (1980).

[37] *Id.* (to be codified in 49 C.F.R. § 1137.21(b)).

[38] *See* page 468 *infra*.

ity contained in the carrier's certificate." [39] The Commission also denied the administrative petitions of household goods movers, represented by the American Movers Conference, seeking to retain the restriction imposed prior to 1980 excluding authority to transport household goods from certificates granting general commodities authorities.

The Commission contends that the portion of its restriction removal statement labelled "guidelines" states only Commission policy and that judicial review is limited to determining whether these guidelines appear, on facial examination, to be rational and within the Commission's statutory authority, without regard to how they are applied. It urges that the petitioners' argument that these will result in grants of overly broad authority are speculative and premature.

The delegation of power to administrative agencies is essential to the implementation of legislative policy in a complex society. Yet Congress knew that governors must themselves be governed and regulators regulated. Congress therefore required an administrative agency to follow specific procedures in adopting regulatory rules. It exempted from these procedures, however, general policy statements designed to inform rather than to control. For this reason, the APA itself draws a distinction between rules and guidelines. The APA requires all agencies to conform to its requirements in promulgating rules, but excepts "interpretative rules" and "general statements of policy" from these requirements. 5 U.S.C.

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[39] Ex Parte No. MC-77 (Sub-No. 3), 46 Fed. Reg. 8,604 (1981) (as amended *id.* at 13,751) (to be codified in 49 C.F.R. § 1310); *id.* at 44,482 (supplemental notice of proposed rulemaking).

§ 553(b)(3)(A). The APA, however, does not otherwise describe the characteristics of each classification. Therefore, the difficulty of discerning the distinction is patent, and it is exaggerated when the effect of the promulgation may be masked by the choice of words used to describe it.[40]

[6] There are two criteria for differentiating rules from guidelines. These were considered by the court in *American Bus Ass'n* v. *United States*, 627 F.2d 525 (D.C.Cir.1980), in an analysis with which we agree. A policy statement is in reality a binding norm (a rule) unless (1) it acts only prospectively, and (2) it "genuinely leaves the agency and its decision-makers free to exercise discretion."[41] The first criterion needs no further discussion and is met by the Commission's Restriction Removal Statement.[42] In applying the second, we look to the language of the

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[40] "[T]he distinction between a rule . . ., which must be published and a 'general statement of policy,' which is not defined in the [APA], is enshrouded in considerable smog." *Noel* v. *Chapman*, 508 F.2d 1023, 1029-30 (2d Cir. 1975), *cert. denied*, 423 U.S. 824, 96 S.Ct. 37, 46 L.Ed.2d 40 (1975). "[T]he problem is baffling. The statute is unclear, and its legislative history helps hardly at all." 2 K. Davis, Administrative Law Treatise § 7:5, at 32 (2d ed. 1979).

[41] *American Bus Ass'n* v. *United States*, 627 F.2d 525, 529 (D.C. Cir. 1980). *See also Guardian Fed. Sav. & Loan Assoc.* v. *Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666 (D.C. Cir. 1978); *Pacific Gas & Elec. Co.* v. *Federal Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974).

[42] The new certificate statement is prospective even if the Commission applies it to pending cases. *See Pacific Molasses Co.* v. *FTC*, 356 F.2d 386, 390 n.11 (5th Cir. 1966) ("New procedural rules published by an agency may be made to apply to pending proceedings . . . and also retroactively if injury or prejudice does not result therefrom.").

Restriction Removal Statement and the manner in which the agency actually applies it.

The "Guidelines for Determining [Restriction Removal] Applications" [43] contains an introductory statement that the guidelines are "designed to assist applicants in filing applications" and are not intended to prejudge any individual application.[44] Yet there are sinews of command beneath the velvet words of the subsequent sections of the guidelines. For instance, for the general commodities carrier, any commodities restrictions except those concerning explosives "are considered unduly restrictive." [45] Authority to transport one or more named commodities or a limited class of commodities is considered unduly restrictive but, if the commodities classification is broadened, the redefinition must conform either to one of the twenty-nine categories of the Standard Transportation Commodities Code (STCC),[46] the commodities definitions set forth in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 (1952) and 766 (1953), or to any other broader class description previously recognized by the Commission.[47] Neither two named commodities nor part of an STCC class will be considered sufficiently broad. These specifics,

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[43] 45 Fed. Reg. 86,747, 86,759-60 (1980) (to be codified in 49 C.F.R. § 1137.20-.29).

[44] *Id.* at 86,759 (to be codified in 49 C.F.R. § 1137.20).

[45] *Id.* (to be codified in 49 C.F.R. § 1137.21(a)).

[46] The modified list of twenty-nine STCC classifications may be found in Appendix A of "Acceptable Forms of Requests for Operating Authority, Ex Parte 55 (Sub.-No. 43a)," 45 Fed. Reg. 86,798, 86,807 (1980).

[47] 45 Fed. Reg. 86,747, 86,759 (to be codified in 49 C.F.R. § 1137.21(b)).

which are the only ones dealing with broadening of commodity authority, are couched in terms of command.[48]

[7, 8] The guidelines read as a whole, are not merely an announcement that, considering both the volume of applications and the limited time within which they must be processed, simple broad descriptions are favored. Instead, decorated with words that appear to be carefully chosen to avert classification as rules, they lead all applicants toward one course—the use of the categories designated by the Commission. The manner of dealing with applicants who do not follow what is declared to be the "normal" course demonstrates graphically that the carrier who does not conform will incur both delay and potentially vast litigation expense. The threat of these, as the Commission itself declares elsewhere in the statement, was used by the industry as a means to develop its straitened channel of narrow authority. Confronted with the threat of opposition by other carriers, applicants considered it prudent to narrow their requests rather than to litigate the full scope of the authority sought. The guidelines provide a similar

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[48] When, as here, the regulations are . . .

> couched in terms of command and accompanied by an announcement of the Commission that the policy is one "which we will follow in exercising our licensing power," they must be taken by those entitled to rely upon them as what they purport to be—an exercise of this delegated legislative power—which, until amended, are controlling alike upon the Commission and all others whose rights may be affected by the Commission's execution of them.

Columbia Broadcasting System, Inc. v. *United States*, 316 U.S. 407, 422, 62 S.Ct. 1194, 1202, 86 L.Ed. 1563, 1573 (1942).

channeling. As a result, these are not guidelines but normative rules,[49] and must be evaluated as such.[50]

The Commission's broadening of commodities classifications must be reasonable, but the statute provides no guide for determining the quality of reasonableness. The very use of this broad qualitative measure indicates that the effort to redefine it may result only in semantic rephrasings of the problem. "Reasonable" implies that the broadening must be rational, logically supportable and fair. Moreover, the requirement that the broadening be reasonable is not merely a stricture on the Commission. In order to achieve the purposes of the Motor Carrier Act, the Commission may also interpret the term "reasonable" to require those carriers who seek a removal of an unreasonably narrow limitation to suggest another that will not also be unreasonably straightened albeit slightly wider than the preceding definition.

To find the standard by which the Commission should balance the objectives of promoting competition, limiting regulation, and yet not unreasonably

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[49] *See Brown Express, Inc.* v. *United States*, 607 F.2d 695, 701 (5th Cir. 1979) ("An announcement stating a change in the method by which an agency will grant substantive rights is not a 'general statement of policy.' ").

[50] When Congress gives an administrative agency the primary responsibility for interpreting a statutory term, the reviewing court may not set aside the regulations promulgated by the agency just because it would have interpreted the term in a different manner. *Batterton* v. *Francis*, 432 U.S. 416, 425-26, 97 S.Ct. 2399, 2405-06, 53 L.Ed.2d 448, [45-57] (1977). The regulations "can be set aside only if [the agency] exceeded [its] statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Id.* In this case we find that the Commission exceeded its statutory authority. *See infra.*

broadening commodities grants, we seek guidance first from the other provisions of the Motor Carrier Act rather than dictionaries and legislative reports. In mandating the removal of unreasonable restrictions, the statute does not dispense with the primary requirement that every carrier be "fit, willing, and able to provide the transportation to be authorized by the certificate." [51] The removal of existing restrictions is to result from the voluntary application of the carrier to the Commission, not from the Commission's fiat.[52]

[9] Because the statute gives the Commission discretion to deny applications for inconsequential expansion, we cannot say that its use of the STCC classification basis or that either of the other two broad commodity descriptions it has approved is an unreasonable starting point. Each of the twenty-nine STCC classifications lists commodities that appear to be generally related.[53] The other broad commodity definitions likewise appear to encompass goods with related characteristics.

The difficulty lies not in the suggestion that these broad descriptions be used when appropriate but in the constraint that every applicant seek equally broad authority. Because the carrier's action in seeking restriction removal is voluntary, and the carrier must be fit, willing, and able, it is not reasonable to require only these classifications or others at least as broad. Within some of these classifications may lurk commodities unrelated to each other or requiring different

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[51] 49 U.S.C.A. § 10922(a)(1)(A) (West Supp. 1981).

[52] *Id.* § 10922(h)(1)(B)(i).

[53] *See* note 46 *supra*.

types of service. The carrier must be permitted, both by the Commission's express statement and actual agency practice, to seek some other commodity classification if it can show that use of the tripartite Commission standard would require the transportation of commodities unrelated to those previously authorized or would require the institution of a different type of service, and that the carrier is not fit or is unwilling or is unable to provide the service. The procedure for seeking such a modification must be reasonably flexible so that applications will neither be arbitrarily prejudged nor condemned to excessive expense. Finally, there must be some opportunity for opposition to an application to be voiced. Opportunities for either applicants or opponents to seek variation from the mandated broad categories is further minimized by the elimination of evidentiary submissions.

The Commission did not choose to cast its action in the form of an administrative presumption that a carrier fit, willing and able to transport two commodities in a given class had equal competence and desire to transport all others that might be embraced. Presumably aware that such a presumption went beyond either business reality or its statutory powers, it has instead put each applicant into the commission's mold while merely professing to allow opportunity for deviation.

With regard to commodity descriptions in restriction removal, the comments of Commissioner Clapp, dissenting in part from the New Certificate Statement are worthy of Commission consideration. "[C]arriers and shippers must be able to make their own business judgments as to the sector of the marketplace in which they are willing and able to participate. A decision to allow carriers some discretion in

commodity choices is *not* restrictive, it is common sense." [54]

2.3.1 Bulk Service

[10] In acting on Restriction Removal applications, the Commission considers restrictions on the authority to carry general commodities, including bulk service restrictions with the exception only of class A and B explosives, to be "unduly restrictive" and provides that they "may normally be removed under these procedures." [55] This provision clearly exceeds the Commission's authority to "*reasonably broaden* the categories of property authorized by the carrier's certificate or permit." [56] By stating that it will routinely grant authority to carry bulk commodities to all applicants requesting general commodities authority,[57] the Commission has exceeded its statutory duty to issue a certificate only to persons "fit, willing, and able to provide the transportation to be authorized by the certificate." [58] Bulk commodities are typically transported in tank trucks, and it is conceivable that many of the applicants for general commodities authority under the restriction removal pro-

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[54] 46 Fed. Reg. 2,296 (1981) (commenting on broadening of authorities for new applications).

[55] 45 Fed. Reg. 86,747, 86,759 (1980) (to be codified in 49 C.F.R. § 1137.21(a)).

[56] 49 U.S.C.A. § 10922(h)(1)(B)(i) (emphasis supplied).

[57] In fact, the Commission has granted bulk service authority in several restriction removal cases that are pending review by this circuit. *See, e.g., Steere Tank Lines, Inc.* v. *ICC, appeal docketed,* No. 81-4169 (5th Cir. May 11, 1981); *Steere Tank Lines, Inc.* v. *ICC, appeal docketed,* No. 81-4083 (5th Cir. Mar. 9, 1981).

[58] 49 U.S.C.A. § 10922(b)(1)(A).

cedures will not even possess the equipment necessary to transport the commodities authorized by the certificate.[59]

2.3.2 Household Goods

When the Restriction Removal Statement was first announced, the guidelines proposed that "[w]here a carrier is authorized to transport general commodities, restrictions having the effect of precluding the transportation of household goods . . . are *not* considered unduly restrictive and are not normally subject to removal under these procedures." [60] This was consistent with the Commission's prior practice of excluding household goods from general commodities authority. The Commission's treatment of household goods as a distinct transportation specialty originated more than forty years ago.[61] The guidelines adopted, however, eliminated the provision excepting household goods from general commodities authority,[62] and

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[59] Indeed, the Commission explicitly stated that "[r]estrictions which require or preclude the use of a specific type of equipment, such as 'in tank vehicles'" are "contrary to the public interest and should be removed via the restriction removal procedure." 45 Fed. Reg. 86,747, 86,759 (1980) (to be codified in 49 C.F.R. § 1137.25(a)).

[60] 45 Fed. Reg. 61,326 (1980) (proposed 49 C.F.R. § 1137.21(a)) (emphasis supplied).

[61] *See* Classification of Motor Carriers of Property, 2 M.C.C. 703, 709-10 (1937). Congress noted the "unique relationship" of household goods movers to the consumer in the House report on the Motor Carrier Act, and thus, "decided to deal with household goods movers in a separate piece of legislation." H.R. Rep. No. 1069, *supra* note 13, at 9, *reprinted in* [1980] U.S. Code Cong. & Ad. News, at 2991.

[62] 45 Fed. Reg. 86,747, 86,759 (1980) (to be codified in 49 C.F.R. § 1137.21(a)).

inferentially classified such an exception as unduly restrictive. The explanation given by the Commission for the change was simply that there was no reason to treat household goods differently from other general commodities, and that the original proposal had been based only on the fact that, when it was made, "we were concerned that the pending Household Goods Act of 1980, would establish an exclusive licensing category for household goods." [63]

The same Congress that adopted the Motor Carrier Act adopted the Household Goods Transportation Act.[64] This Act amended the provisions of the Interstate Commerce Act by providing, for the first time, a specific statutory definition for "household goods," the only commodity defined in the Interstate Commerce Act. 49 U.S.C.A. § 10102(10). Congress also gave the Commission authority to expand that definition to include "such other similar property" as it might provide by regulation. *Id.* The House Report commented, however,

> it is not the intent of the Committee to authorize the Commission to alter this definition with unlimited discretion. In addition, the Committee expects that any proposal to expand the definition be subject to rulemaking procedures which provide for notice and opportunity for comment by interested parties before the Commission acts to grant or to deny such change.[65]

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[63] *Id.* at 86,752.

[64] Pub. L. No. 96-454, 94 Stat. 2011 (1980) (codified in 49 U.S.C. §§ 10102(10), 10734, 10934, 11110, 11711, 11901, and 11917).

[65] H.R. Rep. No. 1372, 96th Cong., 2d Sess. 6, *reprinted in* [1980] U.S. Code Cong. & Ad. News, 4,271, 4,276.

This indicates Congress understood the term "similar property" to be restrictive.[66]

The other provisions of the Household Goods Transportation Act further evince Congressional concern that consumers be protected in contracting for the carriage of household goods.[67] Congress made special provision for regulation of the acts of household goods agents, 49 U.S.C.A. § 10934, and for regulation of household goods carrier operations, *id.* § 11110. Congress provided a separate dispute settlement program for household goods carriers, *id.* § 11711, and specifically excepted violations relating to the transportation of household goods from the penalties provision of *id.* § 11901(g). If every general commodities carrier is ipso facto licensed to carry household goods, the Commission would be deprived of the practical ability to enforce its obligations to the public imposed by these special provisions.

In the Motor Carrier Act, Congress recognized that household goods transportation is a separate service from general commodity transportation by excepting household goods from two of the types of authority that can be granted based solely upon a showing of

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[66] The Commission's notice of proposed rule-making did not propose to change the household goods exception. This is challenged as inadequate notice of a proposed change that resulted in its elimination. In view of the decision we have reached, we need not assess the tenability of the Commission's position that notice of intention to make no change should warn that a change might be made and alert proponents of the status quo to defend it. We draw attention to the statement quoted in text, however, in connection with any future Commission actions that may ensue from this review.

[67] H.R. Rep. No. 1372, *supra* note 65, at 5-6, *reprinted in* [1980] U.S. Code Cong. & Ad. News, at 4275-76.

fitness by the applicant: transportation of property for the United States Government, *id.* § 10922(b)(4)(C),[48] and standards governing the entry of property brokers, *id.* § 10924(b).[49] In addition, while general commodity carriers need not obtain Commission approval to establish rates under which their liability to the shipper for loss or damage to the shipment is limited to a value declared by the shipper, the Commission may require that household goods carriers obtain prior express approval from the Commission in order to establish such released rates. *Id.* § 10730(b)(1).

Furthermore, there are patent differences between the service rendered in transporting household goods for the consumer and those provided in carrying general commodities. The Commission observed in its brief to this court that furniture, air conditioners, refrigerators, and all other items that qualify as "household goods" when shipped to or from a residence have always been within the class of "general commodities" when shipped to or from other kinds of places. From the fact that a chair remains a chair whether it has been in someone's living room or whether it has been crated in excelsior and shipped from a manufacturer to a dealer, the Commission concludes that there is nothing in the inherent nature of "household goods" that makes them inappropriate for carriage by a carrier that has long held general commodity authority.

While the nature of the chair or the refrigerator is unchanged by its use, the service rendered in trans-

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[48] Motor Carrier Act, *supra* note 3, at § 5 (excepting only used household goods).

[49] *Id.* at § 17(a).

porting such commodities after they are purchased by a consumer is manifestly different from that required when they are shipped in crates from manufacturer to retailer. The Commission has itself recognized the differences between the services rendered by household goods and general commodity carriers:

> [Household goods transportation] is a highly specialized and personalized business, and entails to an exceptional degree the necessity of personal contact with the shipper. Generally the individual shipper will not utilize the services of a household-goods carrier more than a few times in his life-time, and the services involve the transportation of his most intimate possessions. Unlike commercial traffic, which is generally prepared and packed for shipment by the shipper and offered to the carrier at a loading dock, household goods require the rendition of numerous accessorial services, such as the careful packing of fragile articles, the crating of mirrors and other items which cannot be transported without special protection, the furnishing of wardrobes for the transportation of unpacked items of clothing, and the protection in transportation of the finished surfaces of furniture.

North American Van Lines, Inc.—Investigation of Control, 60 M.C.C. 701, 723-724 (1955).

[11] In light of the historical recognition of household goods transportation as a specialized service requiring special equipment and highly trained and skilled workers, as well as the adoption of special regulatory requirements applicable solely to household goods carriers, it is illogical and unreasonable for the Commission to permit any general commodi-

ties carrier to perform household goods transportation without any further demonstration of its fitness, willingness, and ability to perform such service.

The Commission urges in final defense of its position that the guidelines do not establish any presumption against seeking authority limited to household goods. This is correct but inconclusive on the issue whether a general commodities carrier may eliminate the restriction against household goods without demonstrating more than its general commodities certificate. Such expansion is unreasonable.

2.4 TERRITORY

[12] The Commission is also, upon carrier application, to "eliminate unreasonable or excessively narrow territorial limitations." 49 U.S.C.A. § 10922 (h)(1)(B)(iv). The "guidelines" provide that authorizations to serve a territory less extensive than a county [70] are considered excessively narrow.[71] A carrier whose certificate is so restricted may seek expansion to all points in the county in which any authorized service point is located.[72] If an authorized service point is located within a given city as well as

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[70] "County" means (1) a county in any State, a judicial district in Alaska, and a parish in Louisiana and (2) a city, town, or village in any State which is not administratively part of a county, New York, N.Y., and Washington, D.C. and their commercial zones as defined by the Commission.

45 Fed. Reg. 86,747, 86,757 (1980) (to be codified in 49 C.F.R. § 1137.3(a)).

[71] *Id.* at 86,759 (to be codified in 49 C.F.R. § 1137.24).

[72] *Id.*

a county, the applicant may seek expansion to the city and its commercial zone.[73]

These standards are appropriately adapted to the elimination of unreasonable territorial limitations. A single point designation such as a particular plant site is obviously unreasonably narrow. What area extending beyond one point is wide enough not to be excessively narrow, yet not so large as to be unreasonably broad, cannot be determined by formula or crow's flight distances. The Statement does contemplate territorial authority broader than typically issued in the past, but the geographic areas it fixes are reasonably bounded and tailored to the purposes of the Act. The Commission has indicated that the county limit is confining and that grants will not be statewide. In its background discussion to the Restriction Removal Statement, it stated:

> Southern Freight Lines, *et al.*, raises the issue of whether a carrier authorized to serve various counties in a State can use these procedures to obtain statewide authority. We believe that such an expansion of authority is outside the scope of restrictions removal. Carriers in such a position are encouraged to use the normal application procedures to expand and consolidate their authorities.[74]

Counties and cities are easily identifiable. They may be centers for similar industries. As the terminals for interstate motor carriers, they are relatively compact in comparison with the travel distance for the carrier. The decision is reasonable and its selection is well within the Commission's discretion.

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[73] *Id.*

[74] 45 Fed. Reg. 86,747, 86,753-54 (1980).

III. NEW CERTIFICATES

3.1 STATUTORY FRAMEWORK

The New Certificates Statement commences with an interpretation of the Motor Carrier Act of 1980: "We are to implement these policies in the entry area by granting broad authorities to future applicants and by removing unnecessary burdens on those now operating. This policy statement is designed to accomplish the goal of awarding broad authorities to future applicants." [75] After preliminary discussion, it announces policies pertaining to specific matters. The first is Acceptable Commodity Descriptions. The Commission will "permit applicants to seek authority commensurate with their business requirements so long as the requested authority is not unduly narrow." The only acceptable descriptions, however, are the three kinds of broad categories discussed in connection with restriction removal. The Commission will decline to except bulk commodities and household goods from general commodities descriptions. As to territorial descriptions, the Commission requires future applicants for common carrier irregular-route service to omit gateway restrictions and narrow territorial limitations, and to describe service areas no smaller in size than counties, and states that such carriers will receive authority to serve points in Alaska and Hawaii as part of an authorization to serve points in the United States. These are the principal provisions attacked.

As we have seen, the Act requires the Commission to remove unnecessary restrictions from existing certificates, but it does not contain a similar explicit

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[75] 45 Fed. Reg. 86,798, 86,798 (1980).

statement concerning new applicants. We turn then to the statute itself to determine its implications. The House Report reviewed the efforts of the Commission in the recent past to reevaluate its historic approach to entry standards, and then stated, "[b]road policy decisions of this type should be made by the Congress and should not be left to the discretion of the Commission." [76] The licensing requirements, 49 U.S.C. § 10922(b)(1), were, therefore, amended by the Motor Carrier Act to make it easier for new trucking companies to enter the market.

The statute retains, however, the "traditional test" [77] that a certificate shall be issued "if the Commission finds—that the person is fit, willing, and able to provide the transportation to be authorized by the certificate." [78] The retention of this standard, tested by forty-five years of interpretation, was deliberate.[79] Entry was eased by revising only the "public convenience and necessity requirement [80] to reduce the burden of proof on persons supporting the application." [81]

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[76] H.R. Rep. No. 1069, *supra* note 13, at 13, *reprinted in* [1980] U.S. Code Cong. & Ad. News, at 2295. *See also* S. Rep. No. 641, *supra* note 14, at 5-6.

[77] H. R. Rep. No. 1069, *supra* note 13, at 14, *reprinted in* [1980] U.S. Code Cong. & Ad. News, at 2296; S. Rep. No. 641, *supra* note 14, at 5.

[78] 49 U.S.C.A. § 10922(b)(1)(A).

[79] H.R. Rep. No. 1069, *supra* note 13, at 14 *reprinted in* [1980] U.S. Code Cong. & Ad. News, at 2296; S. Rep. No. 641, *supra* note 14, at 24.

[80] 49 U.S.C.A. § 10922(b)(1).

[81] H.R. Rep. No. 1069, *supra* note 13, at 14 *reprinted in* [1980] U.S. Code Cong. & Ad. News, at 2296; S. Rep. No. 641, *supra* note 14, at 5-6.

Under new section 10922(b)(1), once the applicant has made a prima facie showing that the proposed service will serve "a useful public purpose, responsive to a public demand or need," [82] the burden of proof shifts to persons opposing issuance of the certificate to show that the proposed service is "inconsistent with the public convenience and necessity." [83] The statute "creates a presumption that the grant of the application is consistent with the public convenience and necessity if the applicant demonstrates that the proposed service will serve a useful public purpose." [84]

The terms "fit, willing, and able" convey a clear meaning. Each requirement relates to providing "the transportation to be authorized by the certificate." 49 U.S.C.A. §10922(b)(1). Regardless of obligations of a common carrier that may be imposed by its status or its holding of a certificate, the statutory test requires that the carrier demonstrate all three attributes as a prerequisite to issuance of the certificate.

[13] We are unable to find support in the statutory language for the Commission's conclusion that it was required, or even authorized, to implement the policies of the Motor Carrier Act by granting to new applicants the very broad authorities it prescribes. The Commission derives its mandate to issue such authority to *new* applicants inferentially from the general policy of the statue to broaden existing certifi-

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[82] 49 U.S.C.A. § 10922(b)(1).

[83] *Id.*

[84] H.R. Rep. No. 1069, *supra* note 13, at 15, *reprinted in* [1980] U.S. Code Cong. & Ad. News, at 2297; S. Rep. No. 641, *supra* note 14, at 5-6, 24. The statute eliminates any showing of public convenience and necessity for certain services, and retains only the "fit, willing, and able" test. 49 U.S.C.A. § 10922(b)(4).

cates. Three reasons were given by the Commission for issuing broad certificates to new applicants. First, "highly restricted authority" compromises overall efficiency, increases fuel use, and prevents carriers from offering service designed to meet the full extent of a shipper's needs or responding promptly to changed market conditions. Second, restricted authority dulls competition because the time required to obtain a new certificate acts as a barrier to prompt competitive adjustment, while the creation of a larger class of potential entrants will press incumbent operators to offer responsive service. Third, the narrower the authority the greater the occasion for unnecessary regulation and its ensuing economic loss.[85]

These objectives may be laudable. They would be served even better by the complete removal of all licensing requirements. Congress did not, however, see fit to deregulate motor carriage. Indeed, it explicitly forbade the Commission to go beyond the powers vested in it by statute and provided it in such detail both for the removal of restrictions on existing certificates and for the alteration of the public convenience showing necessary for the approval of new certificates that it would be anomalous to leave to inference a matter of such significance as the general broadening of new authority.

The Commission relies also on deduction. The Commission reasons that, if restrictions on existing carriers are to be eased, "broad, unencumbered authority" must be granted future applicants, whether or not they seek such authority.[86] It is a nonsequitur to

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[85] 45 Fed. Reg. 86,798, 86,798 (1980).

[86] *Id.* ("[If we broaden authorities] for carriers with existing authorities, we must also assure that future authorities are not subject to the same defects the Congress perceived in our past practices.").

conclude that, because a carrier may, if it voluntarily seeks to broaden authority it already possesses, obtain a reasonably broad extension, such broad, unencumbered authority must be thrust upon all applicants for new certificates whether or not they seek it. The argument implies that a loophole would be created if an applicant were permitted or required to obtain a limited new certificate and could then immediately seek its extension. An applicant would be able to obtain such a result, however, only if it were not required to demonstrate its fitness, willingness and ability to perform the extended service, as it must for a new certificate.

The Commission also argues that this step will help to eliminate the industry's manipulative and anticompetitive practice of constraining applicants to seek very narrow authority by threatening opposition to broader applications and imposing the potentially great expense and delay of litigation on them if they refuse to comply. This pressure perhaps accounts for the fact that, sixty to seventy percent of applications are unopposed and over ninety-five percent are granted.[87] The past industry practice of bullying applicants into narrow applications may be counter to Commission policy; as the Commission itself observed in the statement, the practice may have reflected a recognition by applicants that it was prudent to accommodate the interests of competitors rather than to litigate the full scope of the needed authority.

[14] The Commission, however, has authority to deal with these practices in a suitable fashion; it may refuse to grant excessively narrow applications or it may deal summarily with the kind of obstructive tactics it condemns. Our recognition that it has this

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[87] *Id.*

power, however, is not tantamount to ratification of the cathartic it has adopted. The Motor Carrier Act continues to require the Commission to exact in the future, as it has in the past, the showing of at least general fitness, willingness, and ability to perform the services authorized by the certificate. The Commission's action on new applications is not subject to the same statutory time constraints as those on its processing or restriction removal applications. While it should not be dilatory, it is given more time to resolve problems. Our conclusion that the Commission has gone too far does not obliterate the Commission's power to take any measures at all.

3.2 NEW CERTIFICATE STATEMENT: POLICY OR RULE

[15] The New Certificates Statement purports to be a policy statement.[88] Whether it is merely such a general guide or whether it is a rule masquerading in policy garm, we determine by the criteria discussed in Part 2.2 *supra*. The Commission gave notice of its proposal,[89] received comments from a host of interested persons,[90] and modified its proposal in the light of those comments. It has, therefore, complied with the procedural requirements of the APA for rulemaking. 5 U.S.C. § 553. Our examination of the substance and effect of the statement to determine whether it is a guide for applicants or a quasi-legislative rule, normative in operation, is only for the purpose of determining the scope of judicial review.

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[88] 45 Fed. Reg. 86,709 (1980).

[89] 45 Fed. Reg. 45,545 (1980).

[90] 45 Fed. Reg. 86,789, 86,807 (1980) (Appendix B—Comments of Interested Persons).

While the introductory portion of the Statement is phrased in advisory terms, the text itself is mandatory. The Statement "*direct*[*s*] future applicants to follow certain guidelines in casting their requests for authority." [91] "As a general rule, *no* restrictions would be allowed except in *highly* unusual instances." The Commission "expect[s] applicants to employ commodity descriptions which are *at least* as broad as the standard industry groupings [it] earlier proposed." Its "Employee Boards will screen applications to *ensure* that broad commodity descriptions are being used." "Carriers *are to be able* to perform as complete a service as possible." [92] "Authorizations of less than the total public need *can no longer be tolerated.*" [93] "[W]e *must* in the future grant authority free of gateway restrictions and narrow territorial limitations." [94] "Where applicants justify a need for service in the entire United States, it *will* include service to points in Alaska and Hawaii." [95] "Service over regular routes . . . *is* to be two way." [96] "[W]e intend generally to *disallow all restrictions* except those implicitly or expressly acceptable in the Act." [97] (All emphasis in this paragraph is supplied.)

Besides looking at the actual words of the policy statement, we may also look at the Commission's actual practices under these "guidelines." If, indeed,

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[91] *Id.* at 86,799.

[92] *Id.*

[93] *Id.* at 86,800.

[94] *Id.* at 86,802.

[95] *Id.* at 86,803.

[96] *Id.*

[97] *Id.* at 86,803-04.

the only tests of the policy were hypotheticals, remote in probability and unlikely from past experience, there might be cogency to the Commission's suggestion that we confine our review to the words of the promulgations. But even then we would be required to test the policy by its application, for the rationality of an administrative declaration is not determined by prosody but by determining whether the application of the principle to those regulated by the agency is consistent with its statutory mandate.[98] We may consider the actual application of the policy statement, not only in interpreting it and in determining its rationality, but also in deciding whether what professes to be mere guideline, yielding to evidence in any specific case, is instead a rule to which all must conform.

[16] In short, in its announcement in the New Certificates Statement, the Commission has prescribed the use of its list of certain commodity descriptions, "discouraged" the use of any deviations from the list, and required justification for proposing a deviation from the prescribed list.[99] The Commission

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[98] *See* note 23 *supra*.

[99] In numerous instances the Commission has granted applicants authority they did not seek. In the following cases the applicants applied for authority to transport general commodities (*except* household goods and classes A and B explosives) but were granted by the Commission authority to haul *all* general commodities except classes A and B explosives:

Wayne Thomas, MC 153474 (Sub-1), 46 Fed. Reg. 11,725 (1981); American Freight System, Inc., MC 144678 (Sub-34), *id.* at 11,073 (1981); Emmett Bond, MC 153562, *id.* at 11,063 (1981); Babson Bros. Trucking Co., MC 153524, *id.* at 11,056 (1981); WPX Freight System, Inc., MC 139960, *id.* at 10,873 (1981); R.F. Westbury,

states that carriers may seek to justify departure from its standards.[100] This imposes the same in terrorem constraint that the Commission found to have been the past practice but now condemns: the fear of lengthy and expensive litigation.

MC 145011 (Sub-12F), *id.* at 9,803 (1981). Numerous other instances are cited in the petitioners' briefs and no suggestion that these are erroneous or atypical has been made by the Commission.

The New Certificate Statement has been applied in mechanistic fashion to other applicants. Thus, in *Red Arrow Freight Lines, Inc.* v. *ICC, appeal docketed,* No. 81-4109, (5th Cir. Apr. 2, 1981), the applicant testified, in response to an opposing carrier's argument that it "is not in a position to handle and does not intend to handle [bulk commodities] now or in the foreseeable future," that it had no tank vehicles or no intention to purchase any, and that the only reason it applied for general commodities unrestricted to bulk was because it believed it had to use that description under the Commission's "policy statement." Nevertheless, the Commission refused to restrict the grant of authority against transportation of bulk commodities.

In *Steere Tank Lines, Inc.* v. *ICC appeal docketed,* No. 81-4170, (5th Cir. May 11, 1981), the petitioner opposed the application because it included bulk commodities pursuant to the "policy statement," pointing out applicant had never provided bulk service, had no shippers seeking that service now, and had no equipment or intention to render such service. The applicant conceded all these matters and took no position on whether a restriction should be placed on the certificate. The Commission stated that it "no longer favors imposing bulk restrictions" as they are "too restrictive."

[100] 45 Fed. Reg. 86,798, 86,802 (1980) ("All other [categories] are discouraged, and deviations will require some justification.").

Granting that the distinction between policy declaration and legislative rule is blurred, we conclude that the New Certificates Statement is more appropriately to be considered a rule and that the validity of its prescriptions must be evaluated on this basis.[101]

3.3 COMMODITIES

From the inception of regulation of the motor carrier industry, commodity descriptions have presented the Commission with problems of interpretation and enforcement. Attempts have been made to develop a consistent methodology for describing commodities, and three principal formulas have been used: (1) specific naming of a commodity, (2) reference to intended future use, and (3) generic or class-term commodity descriptions.[102]

A primary concern of the Commission in framing grants of authority has always been to enable a carrier to render shippers and the public a complete transportation service. Broad grants of authority also take cognizance of technological modifications, changing industrial patterns and future needs. Moreover, broad commodity authorizations allow carriers to meet changing needs of shippers, receivers, and consumers, market demands, and the diverse requirements of the shipping public. 49 U.S.C.A. § 10101 (a) (7) (A) & (B).

[17] Congress has mandated that the Commission "reasonably broaden the categories of commodities authorized by the carrier's certificate or permit." *Id.* § 10922 (h) (1) (B) (i). In defining the type of commodity descriptions acceptable from new applicants,

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[101] *See* note 50 *supra*.

[102] *See* C & H Transp. Co., Interpretation of Certificate, 62 M.C.C. 586, 587 (1954).

the Commission may, as in the case of restriction removal, discussed in Part 2.3 above, start with STCC, or other classifications of similar breadth. The Commission may not, however, require all applicants regardless of circumstances to fit Procrustean descriptions, and it may not assume that an applicant fit, willing, and able to carry one commodity in an STCC classification, is fit, willing, and able to carry all commodities in that classification.

3.3.1 Bulk Service

The New Certificates Statement states that the Commission's policy is to "disallow all restrictions except those implicitly or explicitly acceptable in the Act," [103] including elimination of bulk services restrictions from grants of general commodities authority. The Commission recognized that "[w]hile it is true that every carrier does not operate every type of equipment all of the time," it still maintained that "nothing is gained by limiting authorities merely because the applicant does not already have the special equipment." [104] Apparently, the Commission was motivated by a desire to achieve "overall transportation economies and efficiencies . . . by encouraging competition." [105]

[18] Here, as also discussed in Part 2.3.1 *supra*, the Commission has exceeded its statutory mandate by granting authority to carriers who cannot demonstrate that they are "fit, willing, and able to provide the transportation to be authorized by the certifi-

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[103] 45 Fed. Reg. 86,798, 86,803-04 (1980).

[104] *Id.* at 86,804.

[105] *Id.*

cate."[106] Bulk service requires special equipment, such as tank trucks, that many carriers do not have. Moreover, as pointed out by opponents to the Commission's statement, most carriers are not fit to provide bulk service because they will not have the proper cleaning facilities for tank trucks, and in the case of hazardous bulk materials (other than class A and B explosives, will not know the appropriate safety regulations for handling bulk items, or have satisfied the special insurance limits pertaining to hazardous materials.[107]

3.3.2 Household Goods

[19] For the reasons already given in Part 2.3.2 *supra*, the granting of authority to transport household goods must be excepted from general commodities authority unless the applicant demonstrates fitness, willingness and ability to render that service.

3.4 TERRITORY

The Motor Carrier Act demonstrates special concern with territorial restrictions in existing certificates. In addition to the elimination of unreasonable or excessively narrow territorial limitations, the Commission is to authorize transportation service to intermediate points on the carrier's route and round trip authority instead of only one-way authority.[108] In connection with the issuance of *new* certificates, however, it omits any express mention of territorial

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[106] 49 U.S.C.A. § 10922(b)(1)(A), *see, e.g., Steere Tank Lines, Inc.* v. *ICC, appeal docketed*, No. 81-4170 (5th Cir. May 11, 1981); *Red. Arrow Freight Lines, Inc.* v. *ICC, appeal docketed*, No. 81-4109 (5th Cir. April 2, 1981).

[107] 45 Fed. Reg. 86,798, 86,804 (1980).

[108] 49 U.S.C.A. § 10922(h)(1)(B).

limitations just as it omits any mention of commodity authority.[109] The Commission's power to require broader applications or to issue certificates with wider territorial authority than the carrier originally sought must depend on its inherent power or on inferences derived from the purposes of the Motor Carrier Act and its provisions requiring the broadening of existing certificates.[110]

Relying on the same considerations on which it based its commodity guidelines, the Commission implements its new policy by "directing future applicants" to describe requestsed "routes or territories in broad terms. As a general rule, no restrictions would be allowed except in highly unusual situations." The Commission described its modifications as "modest expansions of the geographic descriptions in most cases," and this appears to be accurate.

Common carrier, irregular-route authority is modified to include two-way-authorizations, service areas no smaller in size than county-wide, and authority to serve points in Alaska and Hawaii as part of the authorization to serve points in the United States.[111]

[20] There is no challenge to the two-way service policy. For reasons we have already discussed in connection with broadening existing certificates, the Commission's decision not to limit authority to one point but to embrace a geographic area no smaller

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[109] *Id.* § 10922(b)(1).

[110] 45 Fed. Reg. 86,798, 86,798 (1980). ("Logic dictates that, if we take these actions for carriers with existing authorities, we must also assure that future authorities are not subject to the same defects the Congress perceived in our past practices.").

[111] *Id.* at 86,802.

than a county is reasonable. As the Commission observed:

> Countywide minima are but a minor incursion but do begin to attack the problem of carriers having an insufficient service base. Carriers often cannot serve other consignors or consignees in the general area of existing customers because their authority is limited to plantsites or very narrowly defined places. Discouraging minute limitations on the area an irregular-route carrier can serve should cure this problem.

45 Fed.Reg. 86,798, 86,802 (1980).

[21] However, the Commission also decided to include Alaska and Hawaii automatically in all certifications if applicants justify a need for service in the forty-eight contiguous states. The Commission states that this is "to encourage service to these points, especially by intermodal arrangements." *Id.* at 86,803. The statutory requisites of fitness, willingness, and ability must still be satisfied, however. 49 U.S.C.A. § 10922(b)(1). While a showing of representative need may be consistent with the public convenience and necessity criteria, the notion that any carrier fit, willing, and able to transport throughout the continental forty-eight states its ipso facto fit, willing and able, by intermodal service or otherwise, to provide service to Alaska, 2,385 miles by land from the northwesternmost point of Washington State to Anchorage, and to Hawaii, 2,392 miles by sea or air from San Francisco, defies logic. The Commission's decision obviously rests solely on the stimulation of competition, a goal that cannot be exalted above all others, for, as we have already pointed out, were it the sole objective, there would be no certificates.

Accordingly, we hold this automatic authority provision to be invalid. The Commission may, upon remand, however, consider authorizing those forty-eight state carriers who are found to be fit, willing, and able to provide services to Alaska and Hawaii, to render that service upon a representative showing of need. *Miller Transporters, Inc.* v. *United States*, 594 F.2d 463 (5th Cir. 1979).

3.5 PUBLIC NEED

Those opposing the New Certificates Statement noted that "[c]arriers seeking authority must show that their proposals would serve a useful public purpose, responsive to a public demand or need." 45 Fed.Reg. 86,798, 86,799 (1980). Therefore, in the carriers' view, the Commission 'must examine each application minutely and grant only to the actual extent of support given." *Id.*

[22] The Commission properly responded that "this view contains hypotheses that too narrowly interpret the evidentiary bases on which [the Commission] may grant authorities." *Id.* The statute does not limit it merely to considering and granting authorities based on shipper support or presently moving traffic. Just as in the past, it may consider other evidence, such as traffic studies or anticipated future movements. *Id.* at 86,799-86,800. The Commission must consider all evidence in light of a number of factors, most notably those in the national transportation policy. 49 U.S.C. § 10101(a)(7). Therefore, in considering each application, it must weigh, when applicable, "a need or demand for new services, innovative quality or price options, increased competition, greater fuel efficiency, improved service for small communities, improved opportunities for

minorities, and any other benefits that would serve a useful purpose." H.R.Rep.No. 1069, *supra* note 13, at 15, *reprinted in* [1980] U.S.Code Cong. & Ad. News, at 2297. Shipper support is only part of a schematic representation that can evince a public purpose sufficient to justify a grant of new authority. Other evidence must be considered, and grants broader than existing shipper needs may be.

[23] It is well established that the Commission can grant authority based on representative evidence. Thus, a grant of statewide authority has never needed support from all, or even most, municipalities in the State.[112] All that has been required is support from a representative number of municipalities in the state. Similarly, broad commodity descriptions have been granted based on evidence of a representative showing of commodities falling within that broad description.

3.6 MASTER LICENSING

Paragraph (3) of new section 10922(b) provides that the Commission may not issue a certificate on the basis of general findings regarding public convenience and necessity developed in rulemaking proceedings. The provision was designed to preclude the use of the so-called master certificate approach to granting certificates.[113] Under the "master certificate" approach, "the Commission makes one general finding of public need for a specific type of transportation without looking at the individual carriers

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[112] *See, e.g., Miller Transporters, Inc.* v. *United States*, 594 F.2d 463 (5th Cir. 1979).

[113] H.R. Rep. No. 1069, *supra* note 13, at 15, *reprinted in* [1980] U.S. Code Cong. & Ad. News, at 2297; S. Rep. No. 641, *supra* note 14, at 6.

and situations involved." S.Rep. No. 641, *supra* note 14, at 6.

[24] The argument that the Commission is engaging in master licensing is without merit. The sub-section prohibiting master licensing, 49 U.S.C. § 10922(b)(3), states that the Commission may not make findings of public need based upon general findings developed in rulemaking proceedings. Since it proposes to make findings of a need for service by each applicant in accord with the procedures and standards affirmatively stated in the Motor Carrier Act of 1980, no master licensing is involved. 45 Fed. Reg. 86,798, 86,800 (1980).

SUMMARY

We conclude that the portion of the Restriction Removal Statement, Ex Parte No. MC-142 (Sub. No. 1), denoted "Guidelines" in reality promulgates rules that are subject to judicial review. Several of these rules are improper because they exceed the statutory direction to *reasonably* broaden existing certificates. Therefore, we find invalid as beyond the Commission's authority the rules that virtually require all applicants who seek broader authority to transport commodities to fit into fixed molds of commodity descriptions and the rules authorizing every carrier who requests general commodities authority to carry bulk commodities and household goods. Carriers affected by each of these rules may not be fit, willing, and able to provide the service authorized by the broadened certificate. In all other regards, we reject the attacks on the Commission's regulations regarding restriction removal.

The New Certificates Statement, Ex Parte No. 55 (Sub. No. 43A), although denominated a "policy

statement" by the Commission, also in reality contains binding rules. The Commission's rules broadening acceptable commodity classifications and the rules authorizing those requesting general commodities authorizes also to carry bulk commodities and household goods are unreasonably broad unless the carrier is required to demonstrate that it is fit, willing, and able to provide the service to be authorized by the certificate. We also find that, in the absence of a showing of fitness, willingness, and ability, authority to serve points in Alaska and Hawaii as part of authority to serve points in the continental United States is an unreasonable territorial expansion.

Accordingly, we remand for further proceedings consistent with this opinion. Costs are to be equally divided.

REMANDED.

[Key]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT *
UNIT A

No. 81-4026

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

versus

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Order of the
Interstate Commerce Commission

(October 23, 1981)

ON INTERVENORS' PETITION FOR
REHEARING

Before RUBIN, RANDALL and TATE, Circuit Judges.

PER CURIAM:

The opinion is corrected so that Footnote 4 of the opinion reads as follows:

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452 October 14, 1980.

4. The statement covered both certificates to operate as a common carrier and permits to operate as a contract carrier. Common carriers include those who carry general freight, specialized goods and household goods. Contract carriers (defined in 49 U.S.C.A. § 10102(13) enter into continuing contracts with particular shippers and provide service and equipment to meet those special needs. H.Rep. No. 1069, 96th Cong., 2d Sess. 2, *reprinted in* [1980] U.S. Code Cong. & Ad. News 2283, 2284. The American Trucking Association directed its arguments to this court to common carrier certificates, but certain intervenors attacked the provisions relating to contract carrier permits as well. Although we refer in this case only to common carrier certificates, the regulations and policy statements, concerning contract carrier permits, 49 U.S.C.A. § 10923, are similarly affected by our analysis and conclusions.

To this extent only, the Intervenors' Petition for Rehearing is GRANTED. In all other respects it is DENIED.

Clerk's Note:
See Rule 41 FRAP and Local Rule 17 for stay of the Mandate

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT *
UNIT A

No. 81-4026

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

versus

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Order of the
Interstate Commerce Commission

Before RUBIN, RANDALL and TATE, Circuit Judges.

JUDGMENT

These causes came on to be heard on the petitions of American Trucking Associations, Inc., et al., for review of orders of the Interstate Commerce Commission, and were argued by counsel;

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that these petitions for review of orders of the Interstate Commerce

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452 October 14, 1980.

Commission in these causes be and the same are hereby remanded for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that the costs on appeal be taxed equally by the Clerk of this Court against petitioners and respondents.

October 1, 1981

A true copy

Test:

GILBERT F. GANUCHEAU
Clerk
U.S. Court of Appeals
Fifth Circuit

By /s/ R. Adeline Barnes
Deputy
New Orleans, Louisiana

Issued as Mandate: Nov. 13, 1981

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 81-4026

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION and the UNITED STATES OF AMERICA, RESPONDENTS

Feb. 25, 1982

On petitions for enforcement of previously issued mandate, the Court of Appeals held that: (1) the Court of Appeals had jurisdiction to enforce prior mandate issued in action trade associations brought challenging rules and policy statement adopted by Interstate Commerce Commission in response to enactment of Motor Carrier Act of 1980, and the Court had duty to clarify the mandate and to direct future compliance with it, where the Commission had not fully complied with prior mandate three months after its rendition, and the Commission was apparently continuing to act in many cases without applying the principles exacted by the Act as interpreted in the prior opinion, and (2) writ of mandamus would issue to clarify which parts of Commission "guidelines" governing new applications for operating authority and applications for removal of restrictions from existing operating authority were invalid as exceeding statutory language of Motor Carrier Act.

Writ issued.

See also, 659 F.2d 452.

1. Federal Courts [Key] 957

The Court of Appeals had jurisdiction to enforce prior mandate issued in action trade associations brought challenging rules and policy statement adopted by Interstate Commerce Commission in response to enactment of Motor Carrier Act of 1980, and the Court had duty to clarify the mandate and to direct future compliance with it, where the Commission had not fully complied with prior mandate three months after its rendition, and the Commission was apparently continuing to act in many cases without applying the principles exacted by the Act as interpreted in the prior opinion. Revised Interstate Commerce Act, 49 U.S.C.A. § 10101 et seq.

2. Federal Courts [Key] 957

In issuing clarification of scope of prior mandate, the Court of Appeals was without authority to prescribe procedure to be employed by the Interstate Commerce Commission to allow opportunity for voicing of opposition to applications seeking removal of restrictions from authorities of motor carriers of property, so long as Commission provided method by which opponents to application could enter appearance and make basis for their opposition known. 5 U.S.C.A. § 500 et seq.; Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(h)(1).

William French Smith, Atty. Gen., U.S. Dept. of Justice, Robert J. Grady, I.C.C., Gen. Counsel, Kenneth P. Kolson, App. Sec., Robert B. Nicholson, Antitrust Div., Dept. of Justice, Washington, D.C., for respondents.

Serby & Mitchell, P. C., Alan E. Serby, Atlanta, Ga., for Brannan, Owen, Refrigerated.

Brooks & Matthews, Hugh T. Matthews, Dallas, Tex., for Steere.

Perry, Crockett, Morrisson & Starling, Donald B. Morrison, Jackson, Miss., for Merchants.

Alan J. Thiemann, Gen. Counsel, William H. Shawn, Sp. Counsel, Washington, D.C., for American and Red Arrow and Merchants Truck & Steere.

Robinson, Felts, Starnes & Latting, P. C., Phillip Robinson, Austin, Tex., for Central, Great Western, Miller and Saia.

Phinney, Hallman, Pulley & Coke, Leroy Hallman, Dallas, Tex., for Frozen, Southwestern.

Alan F. Wohlstetter, Stanley I. Goldman, Washington, D.C., for Aero Mayflower, et al.

Thomas E. James, Dallas, Tex., James M. Doherty, Austin, Tex., for Rose Truck Line, et al.

Bruce E. Mitchell, Alan Serby, Atlanta, Ga., for Motor Carrier Lawyers Assoc.

Eugene C. Ewald, Bloomfield Hills, Mich., for Nat. Auto. Transporters.

Keith G. O'Brien, Edward K. Wheeler, Washington, D.C., for Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Dennis Dean Kirk, Washington, D.C., for Specialized Carriers.

On Petition to Compel Enforcement
of
This Court's Mandate

Before RUBIN, RANDALL and TATE, Circuit Judges.

PER CURIAM:

In a prior opinion,[1] we dealt with trade association challenges to rules and a policy statement adopted by the Interstate Commerce Commission in response to the enactment of the Motor Carrier Act of 1980, Pub.L.No. 96-296, 94 Stat. 793 (1980). We held that the rules, guidelines, and policy statements dealing with new applications for operating authority and applications for removal of restrictions from existing operating authorities were all, in reality, binding rules, and that some of these rules were within the ICC's discretion while others transgressed its statutory mandate. We remanded to the Commission to permit it to enact rules within the statutory bounds of the Motor Carrier Act.

I.

On January 6, 1982, the American Trucking Associations and other petitioners and intervenors[2] filed

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[1] *American Trucking Ass'ns* v. *ICC*, 659 F.2d 452 (5th Cir. 1981). The opinion was published on October 1, 1981. After several extensions of time to the ICC within which to seek a rehearing, the mandate was issued on November 13. The time for filing an application for rehearing before the Fifth Circuit or an application for certiorari with the United States Supreme Court has expired.

[2] This group includes: Brannan Systems, Inc., Central Freight Lines, Inc., Frozen Food Express, Inc., Great Western Trucking Co., Inc., Merchants Truck Lines, Inc., Miller Truck Lines, Inc., Owen Motor Freight Lines, Inc., Red Arrow Freight Lines, Inc., Refrigerated Transport Co., Inc., Saia Motor Freight Lines, Inc., Southwestern Motor Transport, Inc., J. H. Rose Truck Lines, Inc., C&H Transportation, Inc., Moss Trucking Co., Inc., Specialized Carriers and Rigging Association, National Automobile Transporters Association, International Brotherhood of Teamsters, Chauffeurs, Ware-

a petition asserting that the ICC "has repeatedly violated both the express and necessarily implied holdings of this court" and seeking to compel compliance with our mandate.[3] On January 11, 1982, the

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housemen, and Helpers of America, and the Motor Carrier Lawyers Association.

This group is made up of petitioner and intervenors in the original proceeding. As we identified the parties in our opinion awarding costs, *American Trucking Ass'ns* v. *ICC*, 666 F.2d 167 (5th Cir. 1982), the American Trucking Associations petitioner group included American Trucking Associations, Inc., Central Freight Lines, Inc., Frozen Food Express, Inc., Great Western Trucking Co., Inc., Merchants Truck Lines, Inc., Miller Truck Lines, Inc., Owen Motor Freight Lines, Inc., Red Arrow Freight Lines, Inc., Saia Motor Freight Lines, Inc., Southwestern Motor Transport, Inc., J. H. Rose Truck Lines, Inc., and Steere Tank Lines, Inc. Joining the American Trucking Associations' brief as intervenors were J. H. Rose Truck Lines, Inc., C&H Transportation, Inc., Moss Trucking Co., Inc., Specialized Carriers and Rigging Association, and National Automobile Transporters Association. Another group of intervenors was the Brannan Systems group composed of Brannan Systems, Inc., Owen Motor Freight Lines, Inc., and Refrigeration Transport Co., Inc. Joining the Brannan System group's brief as an intervenor was the Motor Carrier Lawyer's Association. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, filed a separate brief as intervenors. The Households Goods intervenors including Aero Mayflower Transit Co., Inc., Allied Van Lines, Inc., Global Van Lines, Inc., Imperial Van Lines, Inc., and Wheaton Van Lines, Inc. filed a joint brief. A separate brief was filed by the American Movers Conference, Inc.

[3] Our mandate read:

> These causes came on to be heard on the petitions of American Trucking Associations, Inc., et al., for review

Household Goods Carrier Intervenors[4] filed a Supplemental Petition, likewise seeking enforcement of our mandate. To accomplish this, the petitions, as clarified by later briefs, request that we issue an order:

> 1. Compelling the ICC to comply in all pending actions before it with the "full scope of this Court's opinion;"
>
> 2. Requiring the ICC to review all administratively final decisions issued since October 1, 1981, and, after hearings contradictorily with the certificate and permit holders, to vacate all decisions that grant certificates or issue permits in violation of the mandate; and
>
> 3. Compelling the ICC, if it adopts any replacement rules of an interim nature, to submit those rules to the Court for its approval within 10 days after petitioners have had the opportunity to respond and further compelling the ICC to publish these approved rules in the *Federal Register*.

[1] The ICC has not proposed any new rules. In support of their position, petitioners have called

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of orders of the Interstate Commerce Commission, and were argued by counsel;

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that these petitions for review of orders of the Interstate Commerce Commission in these causes be and the same are hereby remanded for further proceedings in accordance with the opinion of this Court.

[4] This group includes Aero Mayflower Transit Co., Inc., Allied Van Lines, Inc., Global Van Lines, Inc., Imperial Van Lines, Inc., Wheaton Van Lines, Inc., and the American Movers Conference. The American Movers Conference was later allowed to withdraw as an intervenor.

our attention to ICC decisions indicating that the ICC has not complied with our prior opinion in acting on some individual applications for new operating authority or on some applications for removal of restructions from existing operating authorities. In this opinion, we do not attempt to evaluate the ultimate correctness of these representations, which are relevant only to parts 2 and 3 of the order sought, and we of course intimate no opinion concerning the validity of any certificate or permit issued or revised before the date of this opinion. We consider only the issues concerning the ICC's future action, raised in part 1 of the order sought. Although the Department of Justice concedes that we have power to clarify the scope of our mandate, the ICC disputes our authority to do so. Accordingly, we turn first to that question.

City of Cleveland v. *FPC*, 561 F.2d 344 (D.C.Cir. 1977), was the sequel to an earlier opinion by the District of Columbia Circuit. The court's original "mandate directed further proceedings by the Commission." *Id.* at 345 (footnote omitted). Thereafter a controversy "rage[d] over the scope of the investigation that the Commission is thus obliged to make." *Id.* The court held that it had the power to issue a writ of mandamus that would resolve this controversy by clarifying its previous mandate, saying:

> The decision of a federal appellate court establishes the law binding further action in the litigation by another subject to its authority. The latter "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case," and the higher tribunal is amply armed to rectify any deviation

> through the process of mandamus. "That approach," we have said, "may appropriately be utilized to correct a misconception of the scope and effect of the appellate decision." These principles, so familiar in operation within the hierarchy of judicial benches, indulge no exception for reviews of administrative agencies. Our mission thus becomes definition of the exploratory obligation which our mandate laid upon the Commission, and for guidance we refer to our previous opinion.

Id. at 346-47 (footnotes omitted). *See also Oswald* v. *McGarr*, 620 F.2d 1190, 1196 (7th Cir. 1980) ("Mandamus is appropriate to review compliance with discretionary standards and nondiscretionary commands set forth in an earlier opinion concerning the parties."); *Weiser* v. *White*, 505 F.2d 912, 915 (5th Cir. 1975) (it is a "settled principle that a mistake in construction of a mandate should ordinarily be corrected by the court which issued the mandate"), *cert. denied*, 421 U.S. 993, 95 S.Ct. 1998, 44 L.Ed.2d 482 (1975); *Greater Boston Television Corp.* v. *FCC*, 463 F.2d 268, 278 (D.C.Cir.1971) ("an appellate court likewise has continuing power to accept and pass upon a petition to clarify an outstanding mandate"), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2042, 32 L.Ed.2d 338 (1972). Indeed, the ICC concedes that mandamus is the appropriate remedly to enforce the judgment of an appellate court, itself correctly citing, *inter alia*, *Will* v. *United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L.Ed.2d 305, 310 (1967), and the cases cited *supra*. It contests only the adequacy of the showing made to warrant issuance of the writ.

Since October 1, the ICC asserts, it has issued 5000 permits or certificates and it is impossible to deter-

mine which of these might be affected by the ruling without examining the record in each proceeding. The American Trucking Associations petition and that of the Household Goods Carriers cite numerous examples of certificates that do not appear to comply with our ruling. The Household Goods Carriers alone cite sixty-two cases where the Commission issued household goods certificates that appear to violate the ruling. If, indeed, the ICC is not complying with our prior opinion, it is creating the potential for massive future litigation. The volume of matters the ICC is handling is so great that applicants, opponents, and the public, as well as the Commission, should know with certainty the terms of our opinion and enforcing mandate. Absent action by the ICC to effectuate those parts of our opinion requiring changes in its published rules, it is difficult for interested persons or the public to know the procedures in effect and, particularly, the invalidity of those announced guidelines that have been declared invalid.

Three months after the rendition of our prior opinion, the ICC has not fully complied with it. Yet it is apparently continuing to act in many cases without applying the principles that are exacted by the Motor Carrier Act, as interpreted in our prior opinion. Litigation in scores of cases is not adequate remedy for an agency's failure to carry out its statutory duties. Therefore, there is no adequate alternative remedy. *Allied Chemical Corp.* v *Daiflon*, 449 U.S. 33, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980). Because the ICC has promulgated rules never rescinded, it has obviously chosen not to interpret the requirements of the Motor Carrier Act on a case by case basis. Indeed, the ICC anomalously invites us to review and comment on an unpublished interim procedures memo-

randum issued by it for the professed internal guidance of its staff, and to render an opinion that it suggests would be "advisory" concerning whether the procedures there outlined would lead to "unlawful decisions." Our jurisdiction is, however, limited to cases and controversies, Art. III, § 2, United States Constitution, and we clearly lack jurisdiction to advise the ICC. *Hayburn's Case*, 2 Dall. (2 U.S.) 408, 1 L.Ed. 436 (1792).

Adopting the position taken in *City of Cleveland* v. *FPC*, *supra*, we hold that we have jurisdiction to enforce our prior mandate. Having the power, we also have the duty to clarify the mandate and to direct future compliance with it by mandamus. Accordingly, we issue a writ of mandamus to accomplish those ends. After further study, we will issue an opinion dealing with the other issues, summarized in parts 2 and 3 of the recital of the relief sought by the petitioners. See page 960, *supra*.

II.

A. RESTRICTION REMOVAL

First, we deal with the effect of our opinion on the Restriction Removal Statement, "Removal of Restrictions From Authorities of Motor Carriers of Property," Ex Parte No. MC-142 (Sub—No. 1), Fed. Reg. 86,747 (effective Dec. 28, 1980). The Restriction Removal Statement is based on Section 6 of the Motor Carrier Act, 49 U.S.C.A. § 10922(h)(1) (West Supp. 1981). The following mandate applies to every proceeding pending on the effective date of this opinion and to every proceeding commenced hereafter:

1. In order that persons affected by the ICC's rules and the general public may be properly in-

formed, the ICC is required to announce that those parts of the guidelines not declared invalid are rules and to publish them as such. We held, "[t]he Motor Carrier Act requires the Commission to establish a procedure, on application of individual motor carriers, 'to *reasonably* broaden the categories of property authorized.' 49 U.S.C.A. § 10922(h)(1) (emphasis supplied)." 659 F.2d at 461. "What the Commission considers a 'reasonable' broadening of commodities descriptions is described in the second part of the Restriction Removal Statement labeled 'Guidelines.'" *Id.* at 462 (footnote omitted). These "Guidelines" may be found at 45 Fed. Reg. 86,759 (1980). The guidelines "are not guidelines but normative rules, and must be evaluated as such." 659 F.2d at 464 (footnotes omitted).

Those parts of the "guidelines" mentioned below have been declared invalid as exceeding the statutory language of the Motor Carrier Act. The provisions replacing them in compliance with this mandate shall be incorporated into the published rules by a procedure complying with the Administrative Procedure Act ("APA"), 5 U.S.C. § 500, et seq.

2. In every proceeding to "broaden the categories of property authorized" by existing certificates (49 U.S.C.A. § 10922(h)(1)), the Commission shall follow our earlier opinion:

> The carrier must be permitted, both by the Commission's express statement and actual agency practice, to seek some other commodity classification if it can show that use of the tripartite Commission standard would require the transportation of commodities unrelated to those previously authorized or would require the institution of a different type of service, and that the

carrier is not fit or is unwilling or is unable to provide the service.

659 F.2d at 464-65.[5]

While the manner in which the Commission announces its compliance with this part of our mandate is left to it, subject to the requirements of the APA, it must permit applicants to use the flexible standard described above and avoid language containing "sinews of command." 659 F.2d at 463.

As we have already noted, "The procedure for seeking such a modification must be reasonably flexible so that applications will neither be arbitrarily prejudged nor condemned to excessive expense." 659 F.2d at 465.

[2] 3. In every restriction removal proceeding the Commission must provide "some opportunity for opposition to [the] application to be voiced." 659 F.2d at 465. While we indicated in our previous opinion that an opportunity for evidentiary submission by applicants or opponents might be helpful,[6] we are

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[5] The "Guidelines" require, as we previously noted:

> if the commodities classification is broadened, the redefinition must conform either to one of the twenty-nine categories of the Standard Transportation Commodities Code (STCC), the commodities definitions set forth in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 (1952) and 766 (1953), or to any other broader class description previously recognized by the Commission. Neither two named commodities nor part of an STCC class will be considered sufficiently broad.

659 F.2d at 463 (footnotes omitted) (citing 45 Fed. Reg. 36,747, 86,759 (to be codified in 49 C.F.R. § 1137.21(b)).

[6] 659 F.2d at 465 ("Opportunities for either applicants or opponents to seek variation from the mandated broad categories is further minimized by the elimination of evidentiary submissions.").

without authority to prescribe the Commission's procedure so long as it provides a method by which opponents to an application may enter an appearance and make the basis for their opposition known.

4. In every proceeding by which authority to carry general commodities is sought, the ICC is ordered not to grant bulk commodities authority to the applicant without requiring some showing that the applicant is "fit, willing, and able" to provide the bulk commodity transportation sought. As we have previously held:

> By stating that it will routinely grant authority to carry bulk commodities to all applicants requesting general commodities authority, the Commission has exceeded its statutory duty to issue a certificate only to persons "fit, willing, and able to provide the transportation to be authorized by the certificate."

659 F.2d at 465 (footnotes omitted). To further implement this order, the ICC shall rescind the "guideline" mandating the improper result, 45 Fed.Reg. 86,747, 86,759 (1980) (to be codified in 49 C.F.R. § 1151.21(a)).

5. In every proceeding involving a general commodities carrier, the ICC shall not permit the "general commodities carrier [to] eliminate the restriction against household goods without demonstrating more than its general commodities certificate." 659 F.2d 467-68. The ICC shall further require in every such proceeding some showing that the carrier is fit, willing, and able to carry household goods, in accordance with the other provisions of the Motor Carrier Act.[7] The ICC shall revise the "guidelines," 45 Fed.

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[7] The ICC states that it has not required applicants to show that they possess specialized equipment and that it has

Reg. 86,747, 86,759 (1980) (to be codified in 49 C.F.R. § 1137.21(a)), eliminating the provision excepting household goods from general commodities authority, so as to reflect this mandate and the procedure by which it is to be implemented.

B. NEW CERTIFICATES

Our prior opinion also considered the New Certificates Statement, a policy statement entitled "Acceptable Forms of Requests for Operating Authority," Ex Parte No. 55 (Sub—No. 43A), 45 Fed.Reg. 86,798 (effective Dec. 31, 1980). The following mandate applies to every proceeding pending on the effective date of this opinion and to every proceeding commenced hereafter.

1. In order that persons affected by the ICC's rules and the general public may be properly informed, the Commission is required to announce that those parts of the policy statement not declared invalid are rules and to publish them as such. Our prior opinion held that the New Certificates Statement "is more appropriately to be considered a rule and . . . the validity of its prescriptions must be evaluated on this basis." 659 F.2d at 472 (footnote omitted).

Those parts of the "policy statement" mentioned below have been declared invalid as exceeding the authority granted to the Commission by the Motor Carrier Act. The provisions replacing them in compliance with this mandate shall be incorporated into the rules by procedures complying with the APA.

2. The ICC shall permit applicants to apply for any reasonably broad commodity authority and it

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drawn inferences of fitness from past successful operations. Nothing in this mandate requires the ICC to depart from this practice.

shall require a showing that the applicant is fit, willing, and able to carry the commodities for which authority is sought.

As we have stated:

> The Commission may not . . . require all applicants regardless of circumstances to fit Procrustean [commodity] descriptions, and it may not assume that an applicant fit, willing, and able to carry one commodity in an STCC classification, is fit, willing, and able to carry all commodities in that classification.

659 F.2d at 472.

3. Bulk service authority shall not be extended "to carriers who cannot demonstrate that they are 'fit, willing, and able to provide the transportation to be authorized by the certificate.' " 659 F.2d at 473.

4. "[A]uthority to transport household goods must be excepted from general commodities authority unless the applicant demonstrates fitness, willingness and ability to render that service." 659 F.2d at 473.

5. Authority for service to Alaska and Hawaii shall not be granted based only on a need for service in the other forty-eight states, *see* 45 Fed.Reg. at 86,803. 659 F.2d at 474. As we stated in our original opinion, the "Commission may, upon remand, however, consider authorizing those forty-eight state carriers who are found to be fit, willing, and able to provide services to Alaska and Hawaii, to render that service upon a representative showing of need." *Id.*[8]

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[8] Nothing in this opinion alters the requirements for what constitutes a representative showing. *See Miller Transporters, Inc.* v. *United States*, 594 F.2d 463, 466 (5th Cir. 1979) ("The practice of permitting area wide authority on

We reserve judgment on whether the claim made by the household goods intervenors that the ICC has improperly held that they are not proper parties to protest the grant of contract carrier household goods authority is properly before us. We note, however, that intervention in agency proceedings and standing to challenge agency actions in judicial review proceedings are not governed by the same standards. 1 K. Davis, Administrative Law Treatise § 8.11, at 564 (1958).*

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the basis of only a representative showing of the need for new service throughout the area is amply supported by precedent."); *National Trailer Convoy, Inc.* v. *United States*, 381 F.Supp. 878, 882 (N.D. Okl. 1973) (three judge court), *aff'd sub nom. Morgan Drive Away, Inc.* v. *United States*, 416 U.S. 976, 94 S.Ct. 2377, 40 L.Ed.2d 755 (1974); *Hudson Transit Lines, Inc.* v. *United States*, 314 F. Supp. 197, 202 (D.N.J. 1970) (three-judge court).

* In a later section Professor Davis distinguishes four questions:

> (1) Standing of those who are already parties to raise particular questions in an administrative proceeding, (2) standing to intervene in an administrative proceeding, (3) standing to obtain judicial review of administrative action, and (4) standing to resist enforcement of administrative action.

3 K. Davis, Administrative Law Treatise § 22.08, at 239-40 (1958). *See also id.* at 240 ("a party who will be adversely affected by a particular course of action ought always to have standing to assert that that course of action will be in excess of the agency's statutory power or unconstitutional").

> The touchstone for standing to sue under the Interstate Commerce Commission Act is whether the Commission's action threatens or produces a legal injury .... The fact of intervention before the Commission is not enough by itself to establish standing .... Standing is awarded to competitors whose businesses are affected by Commis-

The Clerk shall issue a writ of mandamus in accordance with this opinion. The Clerk is directed to read this opinion by telephone to each of the parties upon receipt, and then immediately to mail each party a copy of it by express or other expedited mail. Except for those parts of the order requiring publication of notice of new rules or rescission of a portion of a guideline or policy statement, *e.g.*, paragraph II.A.1 and the last sentence of paragraph II.B.1, the mandamus order shall become effective at the start of business on the tenth calendar day following the day the order is read to the parties or, if that day is a legal holiday, at the start of the first business day thereafter. The ICC shall, in full compliance with the APA, publish the notices of new rules and notices of rescission of the guidelines and portions of the policy statement excepted from this time limit as soon as practicable thereafter.

[Key]

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sion action as, for example, when new operating rights are granted or new service authorized.

Interstate Investors, Inc. v. *United States*, 287 F. Supp. 374, 392 (S.D.N.Y. 1968) (three-judge court), *aff'd*, 393 U.S. 479, 89 S.Ct. 707, 21 L.Ed.2d 687 (1969). *See also Schwartz* v. *Alleghany Corp.*, 282 F. Supp. 161, 163 (S.D.N.Y. 1968) (three-judge court) ("If the orders are attacked as exceeding the power of the Commission, plaintiff may proceed here without having been a participant in the ICC proceedings.").

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-4026

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., PETITIONERS

versus

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

[Filed Feb. 25, 1982]

WRIT OF MANDAMUS

To the Interstate Commerce Commission:

GREETING:

Whereas the United States Court of Appeals for the Fifth Circuit rendered its decision on February 25, 1982, directing the Clerk of this Court to issue a writ of mandamus;

Now therefore you are hereby commanded to fully comply with the provisions of paragraphs II A 1, 2, 3, 4 and 5 and paragraphs II B 1, 2, 3, 4 and 5 of this Court's opinion above referred to, this 25th day of February, 1982.

GILBERT F. GANUCHEAU
Clerk
United States Court of Appeals
for the Fifth Circuit

/s/ Gilbert F. Ganucheau
For The Court

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT *

No. 81-4026

AMERICAN TRUCKING ASSOCIATIONS, INC., BRANNAN SYSTEMS, INC., CENTRAL FREIGHT LINES, INC., FROZEN FOOD EXPRESS, INC., GREAT WESTERN TRUCKING CO., INC., MERCHANTS TRUCK LINE, INC., MILLER TRUCK LINE, INC., OWEN MOTOR FREIGHT LINE, INC., RED ARROW FREIGHT LINES, INC., REFRIGERATED TRANSPORT CO., INC., SAIA MOTOR FREIGHT LINE, INC., SOUTHWESTERN MOTOR TRANSPORT, INC., AND STEERE TANK LINES, INC., PETITIONERS

versus

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

[Filed Mar. 9, 1982]

Petition for Review of an Order of the Interstate Commerce Commission

Before RUBIN, RANDALL and TATE, Circuit Judges.

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452, October 14, 1980.

BY THE COURT:

IT IS ORDERED that Respondent's motion for a stay of the effect of this court's mandamus order pending the filing of a petition for a writ of certiorari in the United States Supreme Court is DENIED. Statement of reasons will follow.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-4026

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., PETITIONERS

versus

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

[Filed Mar. 10, 1982]

On Motion for Stay Pending Application For Certiorari to the United States Supreme Court

Before RUBIN, RANDALL and TATE, Circuit Judges.

ORDER:

Upon application of the Interstate Commerce Commission ("I.C.C.") we granted three motions to extend the time within which to apply for a rehearing en banc of our opinion dated October 1, 1981. No action was taken by the I.C.C. either to seek a rehearing en banc or to seek a writ of certiorari and the court's mandate issued on November 13, 1981. The mandamus order dated February 25, 1982, was read to counsel over the telephone on the same day. It was to take effect ten days later. The mandamus order merely enforces the prior opinion and in no way alters

that opinion, which has now become final. Accordingly, Fed. R. App. P. 41(b) is not applicable as to the October 1, 1981 opinion, and the only issue now is the propriety of the mandamus order as a method of enforcing that opinion.

Considering that the mandamus order has already taken effect, the delays that have been experienced by the American Trucking Association and other co-petitioners and intervenors, and the course of prior proceedings, the petition for stay is DENIED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Gilbert F. Ganucheau
Clerk

Tel. 504—589-6514
600 Camp Street
New Orleans, La 70130

February 22, 1982

To All Counsel of Record

No. 81-4026—AM Trucking Association vs. ICC & USA

Dear Counsel:

The parties are directed to submit supplemental briefs on the following questions raised principally by the Household Goods Carrier Association.

(1) Is intervention in restriction removal or new certificate proceedings necessary to preserve the right to seek judicial review of the proceedings?

(2) May a person who did not seek to intervene seek judicial review?

(3) Is application for intervention and denial of that application essential?

(4) What is the effect, if any, of the an administrative rule or policy precluding intervention?

In connection with these matters, see 1 K. Davis, Administrative Law Treatise § 8.11 at 564 (1958), 3 *id.* at § 22.08 at 239.40 (1958).

Each brief shall be submitted within ten days from this date. Reply briefs shall be submitted within five days thereafter.

Very truly yours,

GILBERT F. GANUCHEAU
Clerk

By /s/ George G. Bauer, Jr.
GEORGE G. BAUER, JR.
Case Manager

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 81-4026

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION and the UNITED STATES OF AMERICA, RESPONDENTS

March 30, 1982

Carriers and carrier associations aggrieved by alleged failure of Interstate Commerce Commission to follow mandate issued by Court of Appeals and to apply the Court's interpretation of Motor Carrier Act of 1980 in a large number of previously pending cases sought to have such proceedings reopened to determine whether agency disregarded or failed properly to apply the mandate. The Court of Appeals found that there was no statutory basis for such review and that an adequate remedy was available for petitioners-intervenors by following established procedures.

Relief denied.

See also, 5 Cir., 659 F.2d 452, 5 Cir., 669 F.2d 957.

1. Administrative Law and Procedure [Key] 673

To preserve the right to appeal an agency decision, a person must ordinarily intervene. 28 U.S.C.A. § 2344.

2. Administrative Law and Procedure [Key] 673

Word "party" in statute providing that any party aggrieved by final order of specified federal agencies may file a petition to review in the Court of Appeals wherein venue lies is used in a definitive sense and limits right of appeal to those who actually participated in the proceeding. 28 U.S.C.A. § 2344.

See publication Words and Phrases for other judicial constructions and definitions.

3. Administrative Law and Procedure [Key] 513, 673

Those who would intervene in a federal agency proceeding but are denied permission to do so are not without remedies as they may take an immediate appeal within the agency and, if necessary, to the Court of Appeals. 28 U.S.C.A. § 2344.

4. Administrative Law and Procedure [Key] 673

If an appeal is taken by one who was a party to federal agency proceeding, an interested person may petition to intervene in the appellate proceedings. 28 U.S.C.A. § 2323.

5. Administrative Law and Procedure [Key] 665

In two rare instances a person may appeal an agency action even if not a party to the original agency proceeding, those cases being where agency action is attacked as exceeding power of the agency and where one not a party challenges the constitutionality of the statute conferring authority on the agency. 28 U.S.C.A. §§ 2323, 2344.

6. Administrative Law and Procedure [Key] 450

Federal Civil Procedure [Key] 103

Concepts of administrative standing and judicial standing are governed by different standards, in that judicial standing is affected by constitutional limitations derived from Article III's requirement of a case or controversy. 28 U.S.C.A. § 2344; U.S.C.A.Const. Art. 3.

7. Commerce [Key] 151

Request by carriers and carrier associations aggrieved by alleged failure of Interstate Commerce Commission to follow Court of Appeals' mandate in proceeding interpreting Motor Carrier Act of 1980 in a number of previously pending cases, now finally decided, to reopen those proceedings and determine whether ICC disregarded the mandate was refused as there was no statutory authority for such review and an adequate remedy was available to petitioners intervenors by following established procedures; judicial review was otherwise available to intervenors and utilitarian arguments of fully effectuating mandate and efficiently handling the large number of cases in one court were of doubtful validity. Revised Interstate Commerce Act, 49 U.S.C.A. §§ 10101 et. seq., 10922(b)(7), 10923(b)(4); 28 U.S.C.A. § 2344.

Robert J. Grady, Kenneth P. Kolson, Appellate Section, Robert B. Nicholson, Antitrust Div., Dept. of Justice, Washington, D.C., for respondents.

Serby & Mitchell, P. C., Alan E. Serby, Atlanta, Ga., for Brannan, Owen, Refrigerated.

Brooks & Matthews, Hugh T. Matthews, Dallas, Tex., for Steere.

Perry, Crockett, Morrisson & Starling, Donald B. Morrison, Jackson, Miss., for Merchants.

Alan J. Thiemann, Washington, D.C., for American, Red Arrow, Merchants Truck and Steere.

Robinson, Felts, Starnes & Latting, P. C., Phillip Robinson, Austin, Tex., for Central, Great Western, Miller, and Saia.

Phinney, Hallman, Pulley & Coke, Dallas, Tex., for Frozen and Southwestern.

Leroy Hallman, Dallas, Tex., for Steere.

Alan F. Wohlstetter, Stanley I. Goldman, Washington, D.C., for Aero Mayflower, et al.

Thomas E. James, Dallas, Tex., for Rose Truck Line, et al.

James M. Doherty, Austin, Tex., for Moss Trucking Co.

Bruce E. Mitchell, Alan Serby, Atlanta, Ga., for Motor Carriers Lawyers Assoc.

Eugene C. Ewald, Bloomfield Hills, Mich., for Nat. Auto. Transporters.

Dennis Dean Kirk, Washington, D.C., for Specialized Carriers.

Keithe G. O'Brien, Edward K. Wheeler, Washington, D.C., for Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

On Petition to Compel Enforcement
of
This Court's Mandate

Before RUBIN, RANDALL and TATE, Circuit judges.

PER CURIAM:

Carriers and carrier associations aggrieved by the alleged failure of the Interstate Commerce Commis-

sion (ICC) to follow a mandate issued by this court and to apply our interpretation of the Motor Carrier Act of 1980 in a large number of previously pending cases, now finally decided by the ICC, seek to have those proceedings reopened and to have us determine whether the ICC has disregarded or failed properly to apply our mandate. We conclude that there is no statutory basis for such review and that adequate remedy is available to the petitioners-intervenors by following established procedures. Having issued mandamus to compel future adherence to the prior mandate, we refuse to undertake review of past proceedings.

In an opinion [1] dated February 25, 1982, we clarified our mandate in *American Trucking Ass'ns* v. *ICC*, 659 F.2d 452 (5th Cir. 1981). We specifically "reserve[d] judgment on whether the claim made by the household goods intervenors that the ICC has improperly held that they are not proper parties to protest the grant of contract carrier household goods authority is properly before us." *American Trucking Ass'ns* v. *ICC*, 669 F.2d 957, 963 (5th Cir. 1982).

Briefly we recount the arguments made by the petitioners and intervenors on this issue in the briefs accompanying the Petition to Compel Enforcement of This Court's Mandate. The American Trucking Associations Group [2] requested this court to "vacat[e] all administratively final decisions and actions by the ICC issued since October 1, 1981, which grant or issue certificates or permits in violation of the mandate." The Household Goods Carriers also asked us to "cause the vacation of all certificates and permits

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[1] *American Trucking Ass'ns* v. *ICC*, 669 F.2d 957 (5th Cir. 1982).

[2] The parties are fully identified in *American Trucking Ass'ns* v. *ICC*, 669 F.2d 957, 959 n.2 (5th Cir. 1982).

issued by the Commission in violation of this court's opinion." They complained that in some instances their applications for intervention in contract carrier applications had been rejected by the ICC because the "protestants have no standing to appear in opposition, thus precluding these carriers from establishing on a public record that the Commission's proposed grants of household goods carrier authorities are unsupported by any evidence of fitness, willingness and ability to perform the specialized household goods service or any need for such service." The ICC responded that we lacked jurisdiction to review and overturn the numerous agency decisions listed by petitioners, unless proper petitions for review had been filed in those cases with this court. The ICC also noted that the carriers to whom such authorities had been issued were entitled to notice, hearing, and the other concomitants of due process before the rights granted them could be divested. The Household Goods Carriers replied that the "Commission has now immunized its actions from challenge by declaring that household goods carriers are not proper parties to protest the grant of contract carriers household goods authority and now considers these cases as 'unopposed.'"

The American Trucking Associations Group then proposed two alternatives for dealing with certificates or permits issued after our October 1 opinion and in apparent violation of it. The ATA suggested that we "authorize the Commission to enter a show cause order" in each such application proceeding. Individual applicants would "be accorded a reasonable opportunity (20 or 30 days) to demonstrate that a part or parts of authority in conflict with [the] court's opinion should have been granted. A reformed certificate or permit would be issued . . . . Alternatively, the Commission could be directed to

reopen proceedings as required by this court's order and stay taking necessary action on the certificate for a reasonable period of time (20 or 30 days)."

[1, 2] To preserve the right to appeal a decision made in an agency proceeding, a person must ordinarily intervene[3] in that proceeding. 28 U.S.C. § 2344 (1976), provides that "[a]ny *party* aggrieved by the final order may . . . file a petition to review the order in the court of appeals wherein venue lies." (Emphasis added.) The word "party" is used in a definitive sense in the statute, and limits the right of appeal to those who actually participated in the agency proceeding. *See S. C. Loveland Co.* v. *United States*, 534 F.2d 958, 961 (D.C.Cir.1976); *Gage* v. *United States Atomic Energy Comm'n*, 479 F.2d 1214, 1217-21 (D.C.Cir.1973). As one court has noted, "it is incumbent 'upon an interested person to act affirmatively to protect himself' in administrative proceedings, and . . . '[s]uch a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated.'" *Nader* v. *Nuclear Regulatory Comm'n*, 513 F.2d 1045, 1054 (D.C.Cir.1975) (footnotes omitted). *See also National Welfare Rights Org.* v. *Finch*, 429 F.2d 725, 736-39 (D.C.Cir.1970) (stressing that agency intervention makes the right to judicial review effective because the record is properly formed).

[3-6] The proposals of the petitioners and intervenors rest in large part on the assumption that they could not obtain judicial review of the issuance of the challenged authorities in any other fashion. This postulate is unwarranted. Those who would intervene

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[3] The applicable standards for intervention are found at 49 U.S.C.A. §§ 10922(b)(7), 10923(b)(4) (West Supp. 1981).

but are denied permission to do so are not without remedies. They "may take an immediate appeal from that denial within the agency and, if necessary, to the Court of Appeals." *American Trucking Ass'ns* v. *United States*, 627 F.2d 1313, 1318 (D.C.Cir.1980). If it is determined that the right to intervene was improperly denied, then a court of appeals may order the Commission to permit intervention and reopen the prior order for reconsideration. *S. C. Loveland Co.* v. *United States*, 534 F.2d 958, 960 & n.1 (D.C. Cir. 1976) (the court refused to consider petitioner's arguments addressed to the merits of the Commission's order). Of course, if an appeal is taken by one who was a party to the agency proceeding, the interested person may petition to intervene in the appellate proceedings. 28 U.S.C. § 2323.[4]

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[4] In two rare instances a person may appeal an agency action even if not a party to the original agency proceeding. (1) An appeal is allowed if the agency action is "attacked as exceeding the power of the Commission." *Schwartz* v. *Alleghany Corp.*, 282 F. Supp. 161, 163 (S.D.N.Y. 1968) (three-judge court). *Accord, Edward Hines Yellow Pine Trustee* v. *United States*, 263 U.S. 143, 147, 44 S.Ct. 72, 73, 68 L.Ed. 216, 220 (1923) (plaintiffs may maintain suit, although not parties to the ICC order proceeding, if the order is alleged to be in excess of the ICC's power and subjects the plaintiffs to actual or threatened legal injury); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 563-64, 39 S.Ct. 375, 377, 63 L.Ed. 772 (1919) (If the "contention is that the commission has exceeded its statutory powers . . . . the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the commission."). (2) An appeal is allowed if a person, not a party to the agency proceeding, challenges the constitutionality of the statute conferring authority on the agency. 3 K. Davis, Administrative Law Treatise § 22.08, at 240. Neither of these situations obtains here.

Nothing in this opinion is meant to equate administrative standing with judicial standing. We recognize that the two

The petitioners and intervenors can point to neither statute nor precedent authorizing our review of the large number of proceedings involved. They urge that we should nonetheless order this relief, presumably by way of mandamus, both because it would more fully effectuate our prior mandate and because it would be more efficient for one court to handle the large number of cases that may be involved if we undertake the unique kind of review that is suggested. The utilitarian argument is of doubtful validity, for due process would require the joinder of the parties in each proceeding involved, a project that would soon become so vast in size and difficult in issues that its complexity might destroy the effectiveness of the mass undertaking. The petitioners-intervenors compare the specter of a vast number of appeals and great burdens on the appellants and the appellate courts if their remedy is not granted. The ICC pleads that review of the past proceedings would create a vast workload, too great for its meager staff. It is impossible for us to determine a priori whose prediction is chimerical. In any event, the review of each proceeding might require the development of a further evidentiary record and convert our appellate role into that of a trial court. Adequate enforcement

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concepts of standing are governed by different standards. For instance, judicial standing is affected by constitutional limitations derived from Article III's requirement of a "case or controversy." *See Koniag, Inc., Village of Uyak* v. *Andrus*, 580 F.2d 601, 611-17 (D.C. Cir.) (Bazelon, J., concurring), *cert. denied*, 439 U.S. 1052, 99 S.Ct. 733, 58 L.Ed.2d 712 (1978); *Interstate Investors, Inc.* v. *United States*, 287 F. Supp. 374, 392 (S.D.N.Y. 1968) (three-judge court) ("The fact of intervention before the Commission is not enough by itself to establish standing . . . ."), *aff'd*, 393 U.S. 479, 89 S.Ct. 707, 21 L.Ed.2d 687 (1969); 1 K. Davis, Administrative Law Treatise § 8.11, at 564 (1958).

of the mandate has been obtained both by our issuance of the mandamus to govern future proceedings and the availability of appeal for completed proceedings.

Congress has not localized appeals from ICC orders as it has done in the case of those administrative appeals for which it desired uniform review.[5] We should not arrogate the decision making authority meant to be exercised by other circuits. Having done our work, we should allow our colleagues to do theirs.

[7] Lacking statutory authority to undertake the kind of across the board review suggested to us, and the prerequisites for mandamus not having been established,[6] we decline to do so on the basis that it is a corollary method to enforce the mandate.[7] Accordingly, all further relief to seek enforcement of our prior opinion is denied.[8]

SO ORDERED.

[Key]

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[5] *See, e.g.*, Voting Rights Act of 1965, 42 U.S.C. §§ 1973b, 1973c, 1973*l*(b) (the District court for the District of Columbia has sole jurisdiction to issue any declaratory judgment); Economic Stabilization Act of 1970, § 211(b)(2), 12 U.S.C. § 1904 note ("the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title").

[6] The writ will issue only if the party seeking mandamus establishes that he has "no other adequate means to attain the relief he desires," and that his right to issuance of the writ is "clear and indisputable." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980).

[7] The mandate in the October 1 opinion was not issued until November 13, 1981.

[8] This opinion, along with our opinion of February 25, 1982, completes disposition of the Petition to Compel Enforcement of This Court's Mandate.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-810

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner and the responses filed thereto.

IT IS ORDERED that the effect of the writ of mandamus issued by the United States Court of Appeals for the Fifth Circuit on February 25, 1982, case No. 81-4026, be, and the same is hereby, stayed pending the timely filing and disposition by this Court of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to continue in effect pending the sending down of the judgment of this Court.

/s/ Byron R. White
Associate Justice of the
Supreme Court of the
United States

[SEAL]

A true copy
Test:

ALEXANDER L. STEVAS
Clerk of the Supreme Court
of the United States

By /s/ [Illegible]
Chief Deputy

Dated this 29th day of March, 1982.

APPENDIX G

INTERSTATE COMMERCE COMMISSION

49 CFR Parts 1002 and 1137

[Ex Parte MC 142 (Sub-1)]

Removal of Restrictions From Authorities of Motor Carriers of Property

AGENCY: Interstate Commerce Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Motor Carrier Act of 1980 requires the Commission to implement, by regulation, procedures to process expeditiously applications of individual motor carriers of property seeking removal of operating restrictions appearing in their outstanding certificates and permits. The new procedures must be effective by December 28, 1980. The rules proposed would establish expedited procedures for the filing of applications to eliminate restrictions or to broaden unduly narrow authorizations. They would also provide guidelines for the public by indicating certain types of authority which the Commission believes may appropriately be reformed under the special procedures. Adoption of the rules proposed is expected to increase competition in the motor carrier industry, to result in fuel and cost savings and improved efficiency, and to aid in providing and maintaining service to small and rural communities and small shippers.

DATE: Comments are due October 31, 1980.

ADDRESS: The original and, if possible, 15 copies of comments should be sent to: Ex Parte 142 (Sub-

1), Room 5416, Office of Proceedings, Interstate Commerce Commission, Washington, DC 20423.

FOR FURTHER INFORMATION CONTACT:

Howell I. Sporn, (202) 275-7575
or
Edward E. Guthrie, (202) 275-7691.

SUPPLEMENTARY INFORMATION: Section 6 of the Motor Carrier Act of 1980 added a new subsection (h) to 49 U.S.C. 10922 which, as pertinent, provides as follows:

> (h)(1) Not later than 180 days after the date of enactment of this subsection, the Commission shall—
>
> * * * * *
>
> (B) Implement, by regulation, procedures to process expeditiously applications of individual motor carriers of property seeking removal of operating restrictions in order to—
>
> (i) Reasonably broaden the categories of property authorized by the carrier's certificate or permit;
>
> (ii) Authorize transportation or service to intermediate points on the carrier's routes;
>
> (iii) Provide round-trip authority where only one-way authority exists;
>
> (iv) Eliminate unreasonable or excessively narrow territorial limitations; or
>
> (v) Eliminate any other unreasonable restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest.
>
> (2) The regulations promulgated by the Commission pursuant to paragraph (1)(B) of this subsection shall provide for final Commission ac-

tion upon an application not later than 120 days after the date the application is filed with the Commission, except that in extraordinary circumstances the Commission may extend such deadline for a period of not to exceed 90 additional days. Such regulations shall also provide for notice and the opportunity for interested parties to comment, but need not provide for oral evidentiary hearings. In granting or denying applications under paragraph (1)(B) of this subsection, the Commission shall (A) consider, among other things, the impact of the proposed restriction removal upon the consumption of energy resources, potential cost savings and improved efficiency, and the transportation policy set forth in section 10101(a) of this title, and (B) give special consideration to providing and maintaining service to small and rural communities and small shippers.

The transportation policy referred to in this portion of the Motor Carrier Act of 1980 was amended by Section 4 of the Act by the addition of a new paragraph (7) to 49 U.S.C. 10101(a) supplementing the existing national policy:

(7) with respect to transportation of property by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and

working conditions; (E) provide and maintain service to small communities and small shippers; (F) improve and maintain a sound, safe, and competitive privately-owned motor carrier system; (G) promote greater participation by minorities in the motor carrier system; and (H) promote intermodal transportation.

The Congressional Mandate

Congress, in enacting section 10922(h)(1)(B) has given the Commission clear instructions to provide for the expeditious removal of restrictions from motor carrier certificates and permits and for the broadening of narrowly drawn authorities. The directives contained in the statute, however, do not go into detail. They leave the Commission with a significant amount of discretion both in the procedures to be established and the substantive decisions that can be made under them. In implementing the Congressional mandate, we must look both to the provisions of this section and to other indications of the Congress' intentions manifested elsewhere in the Motor Carrier Act of 1980. It is for this reason that we have set out at some length the principal governing statutory provisions.

Procedures.—The keynote of the statutory directive for establishing procedures for restriction removal is "expedition." Even for putting in place these procedures, we are given only a relatively short time period. Regulations implementing the restrictions removal program must be in place within 180 days after its enactment, or December 28, 1980. The statute says that we must process applications "expeditiously," and the regulations we adopt must provide for final Commission action within 120 days af-

ter the application is filed. Only under "extraordinary circumstances" may we extend this time, and then for only an additional 90 days.

The clearly stated Congressional demand for speed, and the very tight time limits imposed, mean that we must adopt procedures that will impose difficult burdens on the parties and on the Commission. The 120-day time limit and, more importantly, the language of section 10922(h)(2) raise questions about the applicability to restriction removal applications of the Administrative Procedure Act.

Section 10922(h)(1)(B) clearly requires that action be taken on the basis of individual applications. However, section 10922(h)(2) states that the regulations which we adopt must "provide for notice and the opportunity for interested parties to comment, but need not provide for oral evidentiary hearings." This language describes precisely the procedure normally followed by agencies conducting informal rulemaking under section 553 of the Administrative Procedure Act, 5 U.S.C. 553. The terms of the statute, therefore, call for informal adjudicatory procedures of the type ordinarily employed in rulemaking proceedings.

In determining what Congress intended to provide in the way of adversarial process in restriction removal cases, there are a number of considerations apart from the words of the statute which we think are pertinent. Congress has clearly expressed its policy to the effect that narrow restrictions and narrowly drawn authorities in the certificates and permits of motor carriers of property are contrary to the public interest. That policy, obviously, does not need to be litigated in each individual case. Furthermore, we will normally be faced in these proceedings not

with issues the resolution of which would be aided by an adversary proceeding, but with the reformation of certificates issued by the agency itself and within the terms of guidelines to be established by the agency.

The express language which allows decisionmaking without oral evidentiary hearings suggests strongly that Congress did not envison these as conventional adversary licensing proceedings, where the decision would depend on the resolution of disputed facts and require an opportunity for the cross-examination of witnesses. As the Congress was aware, the time period established for making final determinations of restriction removal applications will have the effect of making it impossible, in most instances, for the Commission to provide, in addition to the notice and opportunity to comment required by the statute, for a full-scale adversary proceeding. The tight time limit would also make virtually impossible the issuance of an initial decision by the trier of the facts, with an appeal as a matter of right to the agency. The time limit may, in some instances, even make it impossible to prepare a decision detailing the reasons for the agency's disposition of each and every issue involved.

What we perceive to be the Congressional purpose as manifested in the statute is the creation of a simplified and expedited adjudicatory procedure, but one in which the agency determination may be made on the basis of information assembled in a manner analagous to that normally used in informal rulemaking. We conclude therefore, that our decisions in these proceedings need not be made on the record after an opportunity for hearings, and that sections 554, 556, and 557 of the APA do not apply. We are

proposing here the adoption of simplified and expedited procedures in accordance with that conclusion.

Substantive considerations.—The Commission has long been concerned about the imposition of unduly narrow and unreasonable restrictions, the framing of authority in excessively narow terms, and the fragmentation of authority. In *Sykes Transport Co. Common Carrier Application*, 83 M.C.C. 113 (1960), we denied an application which had been made subject to a great many restrictions designed solely to eliminate opposition. We found that the applicant's own interests in obtaining authority without having to meet any opposition from competing carriers had resulted in the subordination of the public interest. In what was probably our principal attempt to come to grips with the restrictions problem, *Fox-Smythe Transp. Co. Extension—Oklahoma*, 106 M.C.C. 1 (1967), we developed a detailed analysis of the many different kinds of operating restrictions and provided guidelines for distinguishing acceptable and unacceptable restrictions.

Despite frequent reiteration of the principle enunciated in *Sykes*, and attempts to follow the *Fox-Smythe* guidelines, the use of narrowly drawn authorities and restrictive limitation has continued to grow. The need to deal with a huge and ever increasing volume of motor carrier applications has made it necessary for us to accept restrictive amendments designed to eliminate opposition in order that as many applications as possible can be disposed of without any, or at least with the minimum, opposition. The result is that probably a majority of the applications granted in the last few years were limited either to service at the facilities of a single shipper or to the transportation of a very narrow

class of commodities, or both. We have deplored this trend, but have felt compelled by events to accept it.

The Congress has now spoken out clearly as to the undesirability of narrowly drawn authorities and restrictions. In the context of broader legislation which recognizes the benefits of competition and relaxed standards for entry into the motor carrier industry, it has determined that unduly restrictive authorities contribute to operating inefficiency, are wasteful of fuel, and make it difficult for members of the shipping and receiving public to obtain promptly and at reasonable costs the services they require. It has given us the responsibility for establishing procedures for eliminating objectionable restrictions.

In only two instances, however, has the Congress provided what we consider to be explicit instructions as to how to proceed. We are to establish procedures for the removal of restrictions against service at intermediate points on the routes of regular-route carriers, and we are to provide round-trip authority where only one-way authority exists. 49 U.S.C. 10922 (h)(1)(B)(ii) and (iii). In all other respects, the statute speaks in broader terms, leaving us with the responsibility for determining what restrictions and forms of authority are unduly narrow. We are to "reasonably broaden" commodity authorizations; to eliminate "unreasonable or excessively narrow" territorial limitations; and to eliminate any other "unreasonable" restriction that we deem "wasteful of fuel, inefficient, or contrary to the public interest."

The rules proposed include guidelines indicating examples of particular kinds of operating restrictions which the Commission believes can, and should appropriately be removed pursuant to the procedures being adopted. We consider its essential that we provide guidelines because of the time limits under which

we must process restriction removal applications. Only if carriers follow established guidelines which indicate what sort of restrictions can be removed and the way in which excessively narrow authorities can be expanded, will it be possible to process individual applications within the 120-day time period. The proposed guidelines, then, are intended to go hand-in-hand with the proposed procedural regulations. Both are essential to our ability to comply with the Congressional mandate.

Section 10922(h)(2) requires the Commission to consider several criteria in granting or denying restriction removal applications. These are the impact of the proposed restriction removal upon the consumption of energy resources, potential costs savings and improved efficiency, and the transportation policy of section 10101(a). In addition, we are directed to give special attention to providing and maintaining service to small and rural communities and small shippers.

We believe that an effective restrictions removal program in which action is taken on the basis of individual applications, as required by the Act, but in terms of guidelines which we will establish here through a public rulemaking process, will promote the public interest considerations implicit in each of these criteria. We are considering, therefore, making a preliminary finding when we adopt final rules in this proceeding to the effect that the granting of an application seeking removal of a restriction which our guidelines identify as objectionable, or the expansion of a narrowly drawn authority in the manner suggested by the guidelines, would normally have a positive effect when considered in light of the section 10922(h)(2) criteria. We use the phrase "preliminary finding" because our guidelines will merely pro-

vide guidance to the public rather than act as a final determinant of a particular application to remove a restriction or expand authority. The proposed rules would require the submission by applicants of information related to the section 10922(h)(2) criteria. Parties would have the opportunity to comment on or rebut the preliminary findings as they pertain to an individual application. Findings on these issues would not, however, be included in decisions on routine restriction removal applications due to time constraints. We are interested in receiving comments on this proposal.

Application Procedures

The Commission has promulgated interim rules in Ex Parte 55 (Sub-43), *Rules Governing Applications for Operating Authority*, 45 FR 45534 (July 3, 1980), which enable carriers to reform their authorities by consolidating a number of fragmented authorities into one or more broad certificates through an application proceeding. We note in that proceeding that such an application can be based largely on evidence of existing service being provided. Carriers desiring to consolidate their outstanding authorities and simultaneously to remove restrictions on these certificates are encouraged to use our new expedited application procedures which are *now* in effect.

Proposed Standards for Applying for New Authority

Since restrictions will be removable under the procedures mandated by section 10922(h)(1)(B), it would be pointless for the Commission to continue to issue, pursuant to applications for new authority, authorities containing objectionable restrictions. To deal with the permissible scope of applications for new au-

thority, we have instituted Ex Parte 55 (Sub-43A), *Acceptable Forms of Requests for Operating Authority*, 45 FR 45545 (July 3, 1980). That proceeding and this one are closely related, and the rules to be adopted here should be consistent with any policy statement or rules to be issued there. Information developed in the course of Ex Parte 55 (Sub-43A) may be considered in this proceeding and used by us in determining what rules should be adopted governing restriction removal applications.

The Rules Proposed

The rules proposed for the implementation of the new restriction removal program are set forth in the appendix to this notice. We also propose to make corresponding modifications to the schedule of filing fees. Comments are invited on every aspect of the proposed rules including, of course, the general issues discussed earlier in this notice. In addition, we wish to point out certain aspects of the proposed rules upon which we believe public comment would be particularly helpful.

Fitness.—Proposed § 1137.10(b), which lists the information that must accompany the application, does not require the submission of information concerning the applicant's fitness or ability to perform service or to receive a grant of authority. As we read the new legislation, a finding of fitness is not a prerequisite to a grant of an application seeking restriction removal under these procedures. Applicants have previously been found fit to receive the certificates or permits which they seek to reform, and a further fitness finding does not appear necessary in the absence of a specific statutory requirement. However, as noted above, section 10922(h)(2) requires the Commission

to consider several criteria in granting or denying restriction removal applications, one of which is the transportation policy set forth in section 10101(a). That policy includes improving and maintaining a sound and safe motor carrier system. Accordingly, comments are sought as to whether a recent finding by the Commission of a carrier's unfitness on safety grounds should be considered as a factor in granting or denying that carrier's restriction removal applications.

Notice.—Proposed § 1137.11 provides for publication of each application in the FEDERAL REGISTER. This is a time consuming process, and will eat into the limited time allowed for final disposition of the application. Comments are sought on whether FEDERAL REGISTER publication is required, whether the provisions of 49 U.S.C. § 10322(b)(3), as amended by Section 25 of the Motor Carrier Act of 1980, are applicable, and whether some other form of notice might be legally sufficient and more expeditious.

Commodity description.—We perceive the reformation of narrowly drawn commodity descriptions as one of the most difficult tasks imposed by the new legislation. Where authorities are framed in terms of one or a limited class of commodity, we are here proposing the replacement of that description by a broader, generic one. One way we propose to do this, as reflected in proposed § 1137.21(b)(1), is to replace such a commodity description with the two-digit Standard Transportation Commodity Code classification which subsumes it. We recognize that the STCC is not wholly appropriate to the reform of motor carrier authorities, and we have discussed its shortcomings at some length in the notice referred to above in Ex Parte 55 (Sub-43A). Comments are sought concern-

ing possible use of the STCC in reforming narrowly drawn motor carrier commodity authorizations.

Another problem area concerning commodity authorizations is descriptions phrased in terms of "commodities dealt in by" some particular business. Usually, this form of authority will allow the holder to transport a broad range of commodities which satisfies the needs of the relevant shipping public and the carrier. As such, the commodity description is considered to be acceptably broad. However, if in Ex Parte 55 (Sub-43A) we decide that some other, broader description, is more appropriate to describe this type of transportation service, we may consider revising the regulations to be adopted to enable carriers to seek that broader commodity description under the statutory restrictions removal program.

Round-trip service.—In Ex Parte MC 131, *Special Limited Authority*, 45 F.R. 2871 (January 14, 1980), the Commission instituted a rulemaking proceeding to establish rules which would enable a carrier holding one-way operating authority to receive authority to transport return loads moving within the scope of the carrier's commodity and territorial authority and restrictions, through a summary grant procedure. This proceeding has been preempted by the new legislation. Nevertheless, we received numerous comments from the public on the backhaul authority proposal which we will consider as part of the record in this proceeding, and will use in developing final rules in this area. The substance of the comments filed in Ex Parte MC 131 convinces us that granting carriers authority for backhaul movements which constitute merely a "mirror image" of their outbound authority will frequently have little practical effect in achieving two-way loaded movements. In many instances,

carriers do not transport the same commodities in both directions to and from a given territory. Accordingly, to further the goals of section 10922(h), we propose that carriers requesting backhaul authority under the rules would receive authority (if so requested) to transport materials, equipment and supplies used in the manufacture, sale, and distribution of the already authorized outbound comodities in addition to those outbound commodities. In Ex Parte MC 55 (Sub-43A), we have requested comments on the desirability of maintaining the commodity description "materials, equipment, and supplies used in the * * *." Comments are sought as to whether complementary backhaul commodities should be authorized, and, if so, what an acceptable commodity description would be. In particular, we are seeking comments on methods for expanding the commodity descriptions beyond the mere "mirror" image mentioned above which are consistent with (1) goals of 10922(h), (2) our proposed rules in Ex Parte 55 (Sub-43) which call for the issuance of two-way authority, and (3) our proposed use of the Standard Transportation Commodity Code to devise broad generic commodity descriptions.

Intermediate point service. In Ex Parte MC 132, *Intermediate Point Restrictions*, 44 FR 71438 (December 11, 1979), the Commission instituted a rulemaking proceeding to establish a rule of construction permitting regular-route carriers of property to serve all intermediate points on their regular service routes. This rulemaking has also been preempted by the new legislation. We will, however, consider the record in that proceeding to be part of the record

in this proceeding, and use it in developing final rules regarding intermediate point service.[1]

Territorial descriptions.—Proposed rule 1137.24(a) proposes the county as the basic unit for describing territorial authority in certificates and permits reformed under these procedures. "County" is defined in proposed § 1137.2(a). Comments are sought on (1) the appropriateness of expanding smaller territorial grants to the county level, and (2) the definition of "county" proposed. In particular, we seek comments on the appropriateness of using the judicial district in Alaska as a substitute for counties in that State, and on the proposed treatment of areas which do not fall administratively into a county. We are considering allowing applicants, at their discretion, to seek expansion of smaller authorities to embrace a given city and points in its commercial zone as an alternative to a county. Comments are sought on this possibility.

Section 1137.24(b) raises the question of how to deal with authorities limited to a particular business' facilities at unnamed points. Limitations to

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[1] Two other proceedings have been superseded by the new legislation: (1) In Ex Parte MC 117, Petitions to Allow Incidental Return Movements by Motor Carriers of Commodities in Bulk, the Commission has been considering the petitions by nine carriers of bulk commodities and one shipper of bulk commodities to institute a rulemaking proceeding to amend the Commission's regulations to allow bulk carriers to perform for-hire backhaul service without specific operating authority; and (2) In Ex Parte MC 139, Removal of Mechanical Refrigeration Restrictions, 45 FR 25419 (April 15, 1980), the Commission instituted a rulemaking proceeding to consider adoption of a rule which would delete from all existing certificates and permits restrictions limiting transportation services to that provided in "vehicles equipped with mechanical refrigeration." The records in these two proceedings will be incorporated in this proceeding.

facilities of some named company or type of industry are clearly restrictive, but to remove them would in many instances arguably require an extensive fact-finding effort which may be impossible given the statutory time limits imposed on applications filed under the restriction removal procedures. Comments were sought on our proposed handling of this issue. Where authorities are limited to a particular business' facilities at named points, the rules to be adopted can be used to obtain broader territorial authority to the extent discussed above.

Traffic moving on limited types of billing.—Many property carrier certificates are limited to traffic moving on the billing of a particular class of shippers. Most frequently found are limitations to movements on government bills of lading or on freight forwarder bills of lading. We believe authority limited to transportation services for the United States Government to be appropriately broad. We note that Section 10922(b)(4)(c) treats government traffic as an acceptable and separate class of traffic. We are, however, considering including freight forwarder bills of lading restrictions in section 1137.25 of the proposed rules as a type of restriction which could normally be removed under the expedited procedures to be adopted. (In making this sugestion we recognize that it may not be wholly consistent with our proposal to use STCC designations in reforming authorities, for one of the STCC categories—number 44—embraces all freight forwarder traffic.) Comments are requested on this proposal.

Limited term authority. Carriers hold outstanding certificates and permits in which the grant of authority was limited to a specified number of years following the issuance of the authority. Under

§ 1137.27 of the proposed rules, we propose allowing carriers holding limited term authority to participate fully in the restrictions removal program. Any limited term authority modified under this program will be limited to the same term imposed in the original authority. Carriers will not be able to use the procedures to be adopted to remove the limited term conditions.

Foreign commerce. Carriers hold outstanding certificates and permits relating to traffic moving to or from Canadian and Mexican points which are restricted to (1) the transportation of traffic originating at or destined to specific points in the two foreign countries, and (2) specific ports of entry on the International Boundary Lines between the United States and the two countries through which the commodities they transport must move. In a policy statement entitled Revised Policy Concerning Applications for Operating Authority to Handle Traffic to and from Points in Canada, 44 FR 60706 (December 28, 1978), the Commission advised the public that it was revising an earlier policy statement on the subject [published at 39 FR 42440 (December 5, 1974), and supplemented at 40 FR 53480 (November 18, 1975)] which had required carriers to specify origins and destinations to be served in the foreign countries as well as ports of entry, and grants of authority were specifically limited accordingly. The new policy statement advised the public that the Commission would not include such restrictions in future grants of authority, and that carriers issued operating authority subsequent to March 3, 1975 (the effective date of the initial policy action) with such restrictions could consider the restrictions to be null and void. However, carriers holding authorities issued before March 3, 1975, were reminded that simi-

lar restrictions contained in their authoriites were still valid and enforceable. The 1978 policy statement has recently been found to be unlawful (due to the Commission's failure to provide notice and to take comments pursuant to 5 U.S.C. 553) by the United States Court of Appeals for the District of Columbia Circuit, *American Bus Association* v. *ICC*, No. 79-1214 (Decided June 25, 1980). The Court did not reach the merits of the policy.

We believe that restrictions on traffic moving from or to points in Canada and Mexico as described above, impede the free flow of international commerce, cause operating inefficiencies, and are contrary to the public interest. Accordingly, we propose to include these restrictions under § 1137.25 of the proposed rules as restrictions which could normally be removed under the expedited procedures to be adopted in this proceeding. This relief would be available for carriers issued authority both before and after March 3, 1975. Carriers issued authority after March 3, 1975, can no longer consider restrictions in their authorities to be null and void because of the Court's decision. Comments are sought as to problems which might arise through eliminating the foreign commerce restrictions in this manner.

Other miscellaneous restrictions. In addition to the above-described foreign commerce restrictions, section 1137.25 of the proposed rules describes other "miscellaneous" restrictions which are susceptible to removal under the restrictions removal program. This list is by no means intended to be all-inclusive, but rather, should be viewed as a guideline to the type of restrictions which can readily be removed through the procedures to be adopted. We solicit comments on other restrictions which should be included in this

list. Carriers are encouraged to take full advantage of the restrictions removal program to reform their authorities.

Environmental and Energy Considerations

We do not believe that the adoption of the proposed rules will have any significant impact upon the quality of the human environment. However, we anticipate that their adoption will improve operating efficiency and reduce mileage, thus contributing to the conservation of energy resources. Comments on these issues are welcome.

Conclusions

We propose:

1. To amend title 49 of the Code of Federal Regulations by the addition of a new part 1137 as described in the appendix to this notice.
2. To amend 49 CFR 1002.2(d) to include a provision setting the filing fee for applications filed under the procedures proposed in the appendix at $350.

This notice is issued pursuant to 49 U.S.C. 10321 and 10922(h) and 5 U.S.C. 553.

Decided: September 2, 1980.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, Alexis, and Gilliam. Commissioner Clapp concurring with a separate expression. Commissioner Stafford not participating.

Agatha L. Mergenovich,
Secretary.

Commissioner Clapp, concurring:

This proposal, if adopted, promises to be one of the most significant changes wrought by the 1980 Motor Carrier Act. While the new entry requirements apply to anyone wishing to provide interstate service, the instant proposal is available only to established carriers. And, although little would be required from them much is to be gained. The potential for enormous increases in authority exists. Therefore, while I agree, for the most part, with this proposal I request comments on several additional issues.

First, I believe our duty to promote a safe and sound transportation industry should not be abrogated without some thought. I request comments on whether more than just a safety analysis should be required. For instance, should we remove major restrictions from the certificate of a carrier recently found unfit by this Commission, while new carriers must prove their fitness in the traditional manner? Should a bankrupt and possibly not operating carrier be able to increase its authority in this manner? What about duplicate authority to commonly controlled carriers?

Our proposal should also present a more neutral view of the question of whether the "mirror image" or the "material, equipment, and supplies" backhaul should be adopted. The decision strongly endorses the "material, equipment, and supplies" backhaul as opposed to the "mirror image" and all but ignores the merits of the latter. I believe a more neutral approach should be followed at this stage since both have advantages. For example, if the "mirror image" approach were used and combined here with the proposal to permit carriers to upgrade their commodity authority to a two-digit STTC code level, carriers

would be able to do much more than carry coals to Newcastle. Also, the "mirror image" has the advantage of being a more precise commodity description than "materials, equipment, and supplies" especially now that we are trying to move away from vague and indefinite descriptions. Thus, before comments are received, I believe it injudicious to assume that either is the more favorable solution.

Appendix

In 49 CFR a new Part 1137 would be added to read as follows:

PART 1137—REMOVAL OF RESTRICTIONS FROM AUTHORITIES OF MOTOR CARRIERS OF PROPERTY

Subpart A—General

Sec.

1137.1 Purpose.
1137.2 Applicability of rules.
1137.3 Definitions.

Subpart B—Procedures

1137.10 Form and content of application.
1137.11 Notice.
1137.12 Participation of interested persons.
1137.13 Disposition of the application.

Subpart C—Guidelines for Determining Applications

1137.20 Scope of this subpart.
1137.21 Commodity descriptions.
1137.22 Intermediate point service.
1137.23 Round-trip service.
1137.25 Miscellaneous restrictions.

1137.26 Contract carriers.
1137.27 Limited term authority.
1137.28 Availability of other application procedures.
1137.29 Impact of restriction removal.

Authority: 49 U.S.C. 10321 and 10922(h) and 5 U.S.C. 553.

Subpart A—General

§ 1137.1 Purpose

These regulations govern the filing, processing, and disposition of applications filed by motor carriers of property seeking to remove operating restrictions for their certificates or permits in order—

(a) To broaden reasonably the categories of property authorized by the carrier's certificate or permit;

(b) To authorize transportation service to intermediate points on the carrier's route;

(c) To provide round-trip authority where only one-way authority exists;

(d) To eliminate unreasonable or excessively narrow territorial limitations; or

(e) To eliminate any other restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest. These regulations implement the provisions of 49 U.S.C. 10922(h)(1)(B) and 10922(h)(2).

§ 1137.2 Applicability of rules.

Applications may be filed under these rules to remove restrictions or broaden authority in certificates and permits issued pursuant to applications filed before [the effective date of the rules]

§ 1137.3 Definitions.

(a) *County.*—"County" means (1) a county in any State, a judicial district in Alaska, and a parish in Louisiana and (2) a city, town, or village in any State which is not administratively part of a county, New York, NY, and Washington, DC, and their commercial zones as defined by the Commission.

(b) *STCC.*—"STCC" means the Standard Transportation Commodities Code Tariff currently on file with the Commission at any given time.

Subpart B—Procedures

§ 1137.10 Form and content of application.

(a) *Form and filing requirements.*—No application form is prescribed for filing applications under these rules. Applicants shall submit an original and one copy of their applications to the Secretary, Interstate Commerce Commission, Washington, DC, 20423. Applicants shall also file a copy of the complete application in the regional office of the Commission for the region in which they are domiciled. Applications shall be typewritten or printed on paper measuring approximately 8½ by 11 inches, with a 1½ inch left-hand margin. Only the original need be signed. A check or money order payable to the Interstate Commerce Commission covering the applicable filing fee ($350) must accompany the application. The envelope containing the application and check shall be clearly marked "Restriction Removal Application". Also each application shall be clearly marked, in the upper right-hand corner of the top page: "Restriction Removal".

(b) *Information which must accompany the application.*—The application shall contain the following information, in the same order as set forth below:

(1) The exact name and address of the applicant

and the docket number assigned by the Commission to the applicant's authorities.

(2) The name and address of applicant's representative if not the same as applicant's address.

(3) A copy of the certificate or permit from which applicant seeks to have restrictions removed or which it proposes be broadened.

(4) A proposed redraft of the certificate or permit with the restrictions removed or the authority broadened as proposed, together with sufficient information for the Commission to determine readily the precise portions of the existing authority which applicant proposes be modified. The redrafted certificate or permit shall be in the same format as the original so that, if the application is granted, it can be issued promptly without further redrafting by the Commission.

(5) In the case of an application to remove a restriction of a type previously found by the Commission to be inappropriate [see § 1137.25(5) of this part], the reference to the Commission decision in which an identical or substantially similar restriction was found inappropriate.

(6) A caption summary of the modifications proposed suitable for publication in the *Federal Register*. The acceptable format may be obtained from a Commission regional or field office.

(c) *Information that should accompany the application.*—The application should include a statement describing the effect of the proposal upon one or more of the following factors—

(1) the consumption of energy resources;

(2) Potential cost savings and improved efficiency;

(3) The provisions of the transportation policy set forth in 49 U.S.C. 10101(a); or

(4) The provision and maintenance of service to small and rural communities and small shippers.

(d) *Related restrictions removal.*—Applicants are expected to combine reasonably related restriction removal requests or requests for broadening of authority in a single application. Two categories of requests are generally considered related: (1) requests related to the same authority. An example of this category would be a carrier which holds a one-way certificate and desires to obtain backhaul authority as well as broaden its territorial and commodity authority under these rules. (2) Requests seeking to remove the same restriction, or restrictions having a similar effect, from a number of different authorities. An example of the second category would be a carrier which desires to remove the same equipment restriction from a number of certificates under these rules. In applications combining requests as described above, each request shall be clearly marked and segregated, with each request fully complying with the requirements set forth in § 1337.10(b)(3), (4), (5), and (6). Failure to comply will result in a rejection of the application. Carriers are free to file consolidated applications which do not fit into the two categories described above.

(e) *Incomplete applications.*—Due to the time limits imposed by 49 U.S.C. 10922(h)(2), the Commission cannot await the supplementing of incomplete applications or make extensive revisions to draft *Federal Register* captions. The failure to submit a complete application and to include a complete, accurate, and informative caption will result in rejection of the application.

§ 1137.11 Notice.

Notice to the public and to competitors of the filing of an application under these rules will be given by the Commission through publication of a caption summary in the *Federal Register*. Applicants must comply with the notice requirements of 49 U.S.C. 10328(b) by serving a copy of the caption summary on the authority of each affected State having jurisdiction to regulate intrastate motor vehicle transportation on the highways of that State or, if there is no such authority, upon the chief executive officer of that State. Applicant shall make copies of the application available for public inspection at its principal place of business and at the office of its representative if at a different location. A copy of the application is also available for inspection at the ICC, Washington, DC, Office of the Secretary.

§ 1137.12 Participation of interested persons.

Any interested person may comment on the applicant's proposal. Comments must be filed with the Commission within 20 days of the date of publication of notice of the application in the *Federal Register*. Comments should be directed to either (a) the merits of the particular proposal or (b) whether the proposal should properly be considered under these rules.

§ 1137.13 Disposition of the application.

(a) *Basis for determining the application.*—Except in extraordinary circumstances, applications will be determined solely on the basis of the application itself and any comments that are received. There will be neither oral hearings nor the opportunity for the submission of evidence under modified procedure.

(b) *The Commission's decision.*—Applications will be published in the *Federal Register* in the form of

tentative decisions granting the authority requested. If no comments are filed, the application will stand granted at the close of the 20th day after the due date for filing comments, unless the Commission, prior to that time, stays the effectiveness of the tentative decision.

(c) *Administrative finality and appeals.*—A decision disposing of an application subject to these rules is a final action of the commission. Review of such an action on appeal is discretionary and is governed by the Commission's appeal regulations at 49 CFR 1100.98.

Subpart C—Guidelines for Determining Applications

§ 1137.20 Scope of this subpart.

This subpart contains guidelines designed to assist applicants in filing applications for the removal of operating restrictions. The guidelines indicate certain types of restrictions or operating limitations in operating authorities which the Commission considers, under normal circumstances, to be excessively narrow, wasteful of fuel, inefficient, or contrary to the public interest. They suggest ways in which some such restrictions might reasonably be eliminated or in which limited authorities might be broadened. The guidelines are not intended to constitute a prejudgment of any individual application.

§ 1137.21 Commodity descriptions.

(a) *General commodities carriers.*—Where a carrier is authoried to transport general commodities, restrictions having the effect of precluding the transportation of household goods as defined by the Commission or classes and B explosives are not considered unduly restrictive and are not normally subject to

removal under these procedures. Other restrictions on the commodities which a general commodities carrier may transport are considered unduly restrictive and may normally be removed under these procedures.

(b) *Named commodities or limited classes of commodities.*—Where a carrier is authorized to transport one or more named commodities, the authority is considered unduly restrictive and may normally be broadened under these procedures. The same is true where a carrier is authorized to transport a limited class of commodities, except as indicated in paragraph (c) of this section. Commodity classes which carry designations of three digits or more in the Standard Transportation Commodity Code are normally considered unduly narrow. Use of these procedures is normally appropriate for applications which seek—

(1) To expand such a commodity authorization to the two-digit STCC level;

(2) To replace such an authorization with a commodity description contained in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 (1952) and 766 (1953); or, (3) to replace such an authorization with a broader class description generally accepted by the Commission, such as commodities in bulk, commodities which because of their size or weight require special equipment, or oilfield commodities as described in *Mercer Extension—Oilfield Commodities*, 74 M.C.C. 459 (1946).

(c) *Commodities dealt in by a particular business.*—Where a carrier is authoriezd to transport "such commodities as are dealt in by" a particular industry, such as mail order houses or retail chain grocery stores, the authority is not considered excessively

narrow, and applications for modification should not normally be filed under these procedures.

§ 1137.22 Intermediate point service.

Certificates which authorize regular-route service and preclude service at intermediate points on the carrier's service routes, either by way of a specific restriction against performing such service or by virtue of the fact that they allow service at certain intermediate points but fail to name other points, are considered unreasonably restrictive. Use of these procedures is appropriate for seeking removal of any restriction or operating condition which inhibits service at intermediate points on a regular-route carrier's service route.

§ 1137.23 Round-trip service.

Certificates or permits which authorize service in one direction only are considered unduly restrictive. Use of these procedures is appropriate for applications which seek return movement authority limited to the same commodities the carrier is authorized to transport on the out-bound trip, and materials, equipment, and supplies used in the manufacture, sale, and distribution of those commodities.

(a) *Less than county-wide authority.*—Except as indicated in paragraph (b) of this section, authorizations to serve a territory less extensive than a county (including authorizations to serve named facilities or limited in a similar manner) are considered excessively narrow. Use of these procedures is normally appropriate for applications seeking the expansion of territorial authority to include all points in the county in which the authorized service point (including any portion of the commercial zone of an authorized point) or other limited service area is located. Use of these procedures is also normally appropriate for

applications to remove restrictions which preclude service at points or areas smaller than a county.

(b) *Service at facilities not precisely located.*— Where a carrier has authority to serve a broad territory limited to service at the facilities of a specified person, company, or type of business, and where the precise location of the facilities, by reference to a city, county, or the like, is not apparent from the certificate or permit, the limitations are not considered excessively narrow, and applications for modification should not normally be filed under these procedures. These procedures can, however, be used to expand authority limited to a particular business' facilities at named points.

§ 1137.25 Miscellaneous restrictions.

Use of these procedures are normally appropriate for applications seeking the removal of the following types of restrictions, which the Commission considers to be contrary to the public interest:

(a) Restrictions which require or preclude the use of a specific type of equipment, such as "in tank vehicles" or "except in dump or hopper type equipment."

(b) Restrictions which prevent a common carrier from participating in joint-like service with another carrier or from handling traffic having a prior or subsequent movement by a specified mode of transportation or type of carrier.

(c) Restrictions which impose size or weight limitations on a specified commodity or limited class of commodities.

(d) Restrictions which specify Canadian or Mexican destinations or origins to be served, or designate specific port of entry point which must be used.

(e) Restrictions which the Commission has found to be inappropriate and has refused to impose in another proceeding.

§ 1137.26 Contract carriers.

Where a permit of a contract carrier limits the carrier's service to that performed for a single named shipper, any other restrictions or any form of authority which limits the scope of the service the carrier may perform for that shipper is considered unduly restrictive. Use of these procedures is normally appropriate for applications seeking to broaden the territorial or commodity scope of contract carrier permits limited to service for a single named shipper. Such applications can request authority to serve the single named shipper, "between points in the United States." These procedures are not appropriate for applications seeking authority to eliminate altogether restrictions to service for named shippers or classes of shippers or to serve additional shippers.

§ 1137.27 Limited term authority.

Certificates and permits limited to a specified term can be modified under these procedures to the same extent as authority without a term limitation. Any modified authority approved under these rules will contain the same term limitation as the original authority. These procedures cannot be used to remove the limited term condition from existing authority.

§ 1137.28 Availability of other application procedures.

The provisions of this subpart which describe as inappropriate the use of these procedures for applications seeking the elimination of certain types of restrictions or the modification of certain types of

limited authorities should not be construed as discouraging the filing of applications seeking such relief pursuant to the Commission's normal application procedures under 49 U.S.C. 10922(b) and 10923(b).

§ 1137.29 Impact of restrictions removal.

The Commission has found that, under normal circumstances, the elimination of restrictions or the modification of authorities designated in this subpart as unduly restrictive, unreasonable, excessively narrow, or contrary to the public interest will reduce the consumption of energy resources, will offer potential cost savings and improved efficiency, will be consistent with the provisions of the transportation policy set forth in 49 U.S.C. 10101(a), and will assist in providing and maintaining service to small and rural communities and small shippers.

APPENDIX H

49 CFR Parts 1002 and 1137

[Ex Parte No. MC-142 (Sub-No. 1)]

Removal of Restrictions From Authorities of Motor Carriers of Property

Decided: December 19, 1980.

AGENCY: Interstate Commerce Commission.

ACTION: Final rules.

SUMMARY: This document contains final rules which implement Section 6 of the Motor Carrier Act of 1980. Section 6 requires the Commission to implement, by regulation, procedures to process expeditiously applications of individual motor carriers of property seeking to remove operating restrictions or to broaden unduly narrow authorizations in their outstanding certificates or permits. The procedures must be effective by December 28, 1980. This proceeding was instituted by a notice of proposed rulemaking served and published on September 16, 1980, at 132 M.C.C. 114, and 45 FR 61326, respectively. Because of the Congressional directive that we have rules in place by December 28, 1980, the final rules will be made effective on that date.

EFFECTIVE DATE: These rules will be effective December 28, 1980.

FOR FURTHER INFORMATION CONTACT:

Ombudsman's Office (202) 275-7440; Howell I. Sporn (202) 275-7575; Edward E. Guthrie (202) 275-7691.

SUPPLEMENTARY INFORMATION:

Background

The Motor Carrier Act of 1980, Public Law 96-296, enacted July 1, 1980, added a new subsection (h) to 49 U.S.C. 10922 which, as set forth in the previous notice, directs the Commission to implement regulations to process applications filed by motor carriers of property seeking to remove operating restrictions from their certificates or permits in order to:

(1) broaden reasonably the categories of property authorized by the carrier's certificate or permit;
(2) authorize transportation service to intermediate points on the carrier's route;
(3) provide round trip authority where only one-way authority exists;
(4) eliminate unreasonable or excessively narrow territorial limitations; or
(5) eliminate any other unreasonable restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest.

Section 10922 requires that action be taken on the basis of individual applications. Time limitations are set for both the promulgation of final rules and the processing of individual applications. The regulations we adopt must be effective by December 28, 1980, and they must provide for final Commission action within 120 days after the application is filed with the Commission. Only under "extraordinary circumstances" may we extend this time for an additional 90 days.

In granting or denying applications the Commission is to (A) consider, among other things, the impact of the proposed restriction removal upon the consumption of energy resources, potential cost sav-

ings and improved efficiency, and the national transportation policy set forth in 101101(a), and (B) give special consideration to providing and maintaining service to small and rural communities and small shippers.

In the previous notice, we proposed rules that would establish expedited procedures for the filing of applications to eliminate restrictions or to broaden unduly narrow authorizations. The rules also included proposed guidelines for the public by listing certain types of authority which the Commission believes may appropriately be reformed under the restriction removal procedures. The Commission invited comments on all aspects of the rules. In addition, we pointed out certain aspects of the proposed rules on which we believed public comment would be particularly helpful.

The final rules we are adopting are set forth in Appendix A. They are substantially similar to the ones proposed. In light of numerous helpful suggestions made by commentors, some modifications and additions have been made to both the application process and our guidelines to the public. The changes are highlighted in the text of this document.

Preliminary Procedural Matters

The rules adopted in this proceeding will be effective on December 28, 1980.

Under Section 553(d)(3) of the Administrative Procedure Act [5 U.S.C. 553(d)(3)], an agency may deviate from the normal 30-day period before rules promulgated by the agency become effective "for good cause found and published in the rules." We conclude that the Congressional mandate for final

rules to be in place by December 28, 1980, constitutes good cause to trigger the exception of section 553(d)(3).[1] In any event, the exemption in 5 U.S.C. 553(d)(1) for rules which grant or recognize an exemption or relieve a restriction also applies here. Furthermore, no person will be adversely affected. The regulations neither require any carrier to do nor to refrain from doing anything. Rather, the new regulations serve as an open-ended invitation for motor carriers to take advantage of the Congressional initiative to enable carriers to remove restrictions or to broaden unduly narrow authorizations in outstanding certificates and permits.

The Motor Carrier Lawyers Association (MCLA) requests oral argument. We doubt that oral argument would add anything of substance to the excellent comments we have received. The proposed regulations are essentially procedural and are intended to implement a well understood Congressional policy favorable to the elimination of useless restrictions. We do not perceive any significant policy, legal, or factual matters that could be elucidated through oral presentation. Given these conclusions, as well as the time constraints we face in implementing final rules, we shall deny the request for oral argument.

The MCLA also includes a motion that the Commission renotice this proceeding because we did not include a Statement of Energy Impact and Environmental Impact Statement in our notice of proposed

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[1] The need for an agency to comply with a legislative directive for expeditious promulgation of regulations has been found by courts to constitute "good cause" under section 553(d)(3). *See e.g, U.S. Steel Corp.* v. *U.S.E.P.A.*, 605 F.2d 283 (7th Cir. 1979); *Clay Broadcasting Corp. of Texas* v. *United States*, 464 F.2d 1313 (5th Cir. 1972), rev'd on other grounds 415 U.S. 336 (1974).

rulemaking. For the reasons set forth in detail later in this decision, we believe the petition is without merit, and it will be denied.

Procedures for Processing Applications

A number of parties object to the procedures we have proposed to process restriction removal applications. These parties generally argue that the proposed rules are violative of the Administrative Procedure Act and deny due process. Their position is that we are required to employ a formal adjudication procedure similar to that used for processing applications for conventional operating rights authority.[2] Several parties assert that the 20-day period for filing comments to individual applications is unreasonably short.

We believe that opponents to our proposed procedure misread our congressional mandate in this area. We affirm the approach to developing these regulations stated in the previous notice. We have, however, made two procedural changes in the rules.[3]

First, at the suggestion of numerous parties, the final rules contain a provision requiring any applicant to furnish a copy of its application package to any interested party upon payment of a $10.00 fee. Second, to account for that procedural addition, we will extend the time to file comments from the 20-day period we proposed initially to 25 days from the date of publication of the application in the *Federal Register*. These changes should provide additional notice for potential commentors and better enable those

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[2] *See* Ex Parte No. 55 (Sub-No. 43), *Rules Governing Applications for Operating Authority*, 45 FR 45534 (1980).

[3] We have also added a new section to the rules—1137.15 Compliance, which is discussed later in this decision.

parties to file well-reasoned comments to restriction removal applications.

Our previous notice solicited comments on the question of whether new 49 U.S.C. 10322(b) required *Federal Register* publication of each restriction removal application, and whether some other form of notice might be legally sufficient and more expeditious. We expressed our concern that *Federal Register* publication is a time consuming process that will absorb much of the limited time allowed for final disposition of the applications.

The comments we received on this issue almost universally expressed the viewpoint that *Federal Register* publication is necessary to adequately inform interested parties of restriction removal applications.[4] Although no party has argued that such notice is required by 49 U.S.C. 10322(b), they generally agree that from a practical standpoint there is no other means by which notice can be given to carriers having a potential interest in given applications.

In light of the comments, we will require that each application be published in the *Federal Register*. In making this decision we do not believe that it is necessary to reach a legal determination as to whether such notice is in fact required by Section 10322(b).

As noted above, several parties argue that the 20-day period (which has been lengthened to 25

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[4] Two commentors contend that Federal Register publication is not required. American Cyanamid Company asserts that Section 10322(b)(3) requires publication only in cases of original applications for authority. The Aluminum Association, Inc., states that it is only necessary to publish restrictions which the Commission determines to be excessively broad or outside the mandate of the statute.

days) is inadequate. C & H Transportation Co., Inc., *et al.*, argue that at least 40 days is necessary. On the other hand, Arrow Truck Lines, Inc., states that 20 days is sufficient time due to the statutory mandate for expeditious treatment of restriction removal applications.

We believe, on balance, that 25 days is an adequate length of time to file comments to individual applications.

As we noted in our previous notice, the congressional demand for speed, and the very tight time limits imposed, mean that we must adopt procedures that will impose difficult burdens on the parties and the Commission.

An important factor to note in this area is that comments are limited by the rules to either (1) the merits of the particular proposal, or (2) whether the proposal should properly be considered under these rules. See § 1137.13 (of the *final* rules). The limited issues to address in these proceedings should not necessitate a period longer than 25 days.

Finally, where parties file comments to an application, the Commission will be left with approximately 60 days to issue a final Commission decision (barring a showing of "extraordinary circumstances"). Given the large volume of applications we expect, this should provide us with no more than the bare minimum time needed to comply with our statutory time limits.

A. *The Congressional Mandate*

As noted above, the statute mandates that we process restriction removal applications "expeditiously", since the regulations we adopt must provide for final Commission action within 120 days

after the application is filed. Only under "extraordinary circumstances" may we extend this time, and then only for an additional 90 days.

To comprehend fully the magnitude of the legislative directive, one must recognize that there are about 21,000 motor carriers of freight holding authority issued by this Commission. These carriers collectively hold approximately 500,000 outstanding certificates and permits. We believe that it is reasonable to assume that a large percentage of these authorities contain restrictions or unreasonably narrow authorizations susceptible respectively to removal or broadening under these rules. Given the new competitive environment in the motor carrier industry, we expect many carriers will take early, and full, advantage of the congressional initiative implemented in this proceeding. Moreover, at the present time we see no desirable manner of staggering the application filings for our administrative convenience in handling the large number of applications we expect.

We believe that the parties opposing our proposed procedures overlook several significant factors. First, there is clear significance in the fact the Congress imposed a time limit of *180 days* for the Commission to issue an *initial decision* in modified procedure cases for operating rights and only *120 days* for *final* Commission actions in restriction removal applications. Hence, if the Congress intended that similar types of issues be explored in these two types of proceedings, it would not have imposed such disparate time limitations.

We believe that the different time periods to a large extent reflect a Congressional appreciation that the two types of cases raise dissimilar issues for ultimate Commission resolution. In conventional licensing, after all, we ordinarily deal with the in-

troduction of new carriers or the extension of existing carriers into new markets, where the issues of new or improved service and competitive impact, and the resultant public benefits or harm, play pivotal roles in the decisionmaking process. Restriction removal cases, although plainly of importance from both a public and private viewpoint, involve a narrower focus. There, we are concerned mainly with issues of improving efficiency and allowing existing operators to provide service in a more economical manner. Quite often (although not necessarily always) they will not involve the injection of a carrier into a new market or the redistribution of competitive relationships.

Our view is supported by Section 10922(h)(2) which states that the regulations we adopt must "provide for notice and the opportunity for interested parties to comment, but need not provide for oral evidentiary hearings." This language describes precisely the procedures normally followed by agencies conducting informal rulemaking under the Administrative Procedure Act, 5 U.S.C. 553. This language also suggests strongly that Congress did not envision these as conventional adversary licensing proceedings, where the decision would depend on the resolution of disputed facts and require the opportunity for the cross-examination of witnesses. Our preliminary determination, which we affirm here, is that the terms of the statute call for informal adjudicatory procedures of the type ordinarily employed in rulemaking proceedings, rather than procedures used in conventional adversary licensing proceedings.

Third, contrary to MCLA's assertion, our procedures are not founded solely upon the provision of the statute. As we stated at page 117 of our previous notice:

In determining what Congress intended to provide in the way of adversarial process in restriction removal cases, there are a number of considerations apart from the words of the statute which we think are pertinent. Congress has clearly expressed its policy to the effect that narrow restrictions and narrowly drawn authorities in the certificates and permits of motor carriers of property are contrary to the public interest. That policy, obviously, does not need to be litigated in each individual case. Furthermore, we will normally be faced in these proceedings not with issues whose resolution would be aided by an adversary proceeding, but with the reformation of certificates issued by the agency itself and within the terms of guidelines to be established by the agency.

B. *Applicabiilty of the Administrative Procedure Act*

In our previous notice we stated our preliminary conclusion that these proceedings need not be made on the record after an opportunity for hearings, and that the provisions of Sections 554, 556, and 557 of the APA that are pertinent to formal hearings do not apply. We proposed the adoption of simplified and expedited procedures in accordance with that conclusion.

We affirm our determination that the above-cited provisions of the APA are not applicable to our restriction removal application procedures. We do, however, believe that the requirements of Section 555 (e) of the APA should be applied.[8]

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[8] Section 555(e) of the APA, as pertinent, provides: "(e) Prompt notice shall be given of the denial in whole or in part of a written application . . . in connection with any agency

It is well settled that the APA does not require the adjudicatory procedures of section 554, 556, and 557 in all cases of "adjudication". These sections apply only to "every case of adjudication required by the statute to be determined on the record after opportunity for agency hearing." [6]

As noted above, Section 10922(h)(2) states that the regulations we adopt must "provide for notice and the opportunity for interested parties to comment, but need not provide for oral evidentiary hearings." The parties opposing the proposed procedure have not offered any rational explanation to support their contention that this language should properly be interpreted to require the Commission to provide for a formal adjudication on the record after opportunity for agency hearings. We see no need for a full-scale adversary proceeding.

Sction 10922(h)(2) leaves the Commission with a significant amount of discretion in both the procedures to be established and the substantive decisions that can be made under them.

The Supreme Court has stressed that regulatory agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multi-

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proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial." This subsection applies to all agency proceedings—formal or informal *See* Davis, *Administrative Law Treatise*, § 16.00-5 at 391-392 (1970 ed.), citing Administrative Procedure Act, S. Rep. No. 79-248, 79th Cong., 2d Sess., at 206 (1946).

[6] Davis, *Administrative Law Treatise*, § 16.00-4, pp. 390-391 (1970 Ed.).

tudinous duties." [7] Also, where an agency fashions its regulations to implement its congressional mandate, courts generally will not interfere with the prerogative of the agency to select the remedy which through rational reasons it deems most appropriate.[8]

As we stated in our previous notice (at 117), "the tight time limits, may, in some instance, even make it impossible to prepare a decision detailing the reasons for the agency's disposition of each and every issue involved.[9] Also, we observed (at 119) that a discussion of all the 10922(h)(2) criteria relevant to a particular application would not be included in decisions on routine restriction removal applications due to time constraints.

We stand by our previous statements and findings will be issued in contested cases. We should emphasize that every decision rendered under these procedures will have a rational basis. We also shall issue decisions briefly explaining the reasons an application was granted or denied in cases where interested parties have filed comments rasing material issues.

We believe that our procedures are fully consistent with the congressional mandate. We also believe that no party will be denied due process because our pro-

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[7] *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *F.C.C.* v. *Schreiber*, 381 U.S. 279 (1965).

[8] *Condor Operating Co.* v. *Sawhill*, 514 F.2d 351 (Emer. Ct. App. 1975); cert. denied, 421 U.S. 970 (1975).

[9] Courts have recognized the inherent difficulties that agencies face in meeting tight statutory deadlines and generally have found agency procedures which deal with time constraints, to be reasonable. *See e.g., United States Steel Corp.* v. *United States Environmental Protection Agency*, 605 F.2d 283 (7th Cir. 1979), cert. denied, 100 S.Ct. 710 (1980), —— U.S. —— (1980). *International Harvester Company* v. *Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973).

cedures provide all parties with a fair and meaningful opportunity to be heard. On the other hand, the application procedures we adopt will aid the Commission in coping with the statutorily imposed time constraints.

C. *Alternative Procedures*

Significantly, no party has offered a viable alternative to the procedures we have proposed. The MCLA, for example, has suggested that we provide for an expedited modified procedure, including a provision for an applicant's rebuttal statement, and an appeal of right from an initial decision. Their proposed procedure is premised upon having an application published in the *Federal Register* within 7 days of its receipt by the Commission. This is simply unrealistic. As we explain in detail in our final rule in Ex Parte No. 55 (Sub.-No. 43), through diligent effort we are publishing applications for operating rights authority within 30 days from the date of filing, as compared to the 3- to 6-month period experienced in 1979 and early 1980. Nor can the Commission put all its work on new conventional applications "on hold" to handle restriction removal applications, because of the 180-day statutory time limit imposed by the Act (49 U.S.C. 10322) for issuing an initial decision in modified procedure cases.

The American Trucking Associations, Inc. (ATA), argues that the statute calls for formal adjudication under the APA. However, they basically agree with our proposed procedure, with one major exception. The ATA would add a provision allowing applicants to file a reply to a comment if it could demonstrate that "extraordinary circumstances" exist which would justify the Commission's extending the deadline and

permitting a reply. They express their belief that such replies "would not be common" because of carriers' anticipated general reluctance to forego the benefits of restriction removal for up to an additional 90 days. We do not believe that a reply stage would be of significant benefit to the parties, or to the Commission's decisionmaking process. We believe that the "extraordinary circumstances" provisions would be more productively used as a mechanism for parties to file a discretionary appeal.

Proposed Standards for Applying for New Authority

In our previous notice we observed that, since certain restrictions will be removed under the procedures mandated by Section 10922(h)(1)(b), it would be pointless for the Commission to continue to issue, pursuant to applications for new authority, authorities containing objectionable restrictions. To deal with the permissible scope of new authority, we are contemporaneously issuing a final policy statement in Ex Parte No. 55 (Sub-No. 43A), *Acceptable Forms of Requests for Operating Authority*, 45 F.R. 45545 (1980). That proceeding and this one are obviously closely related.[10]

The rules that we have adopted in our restriction removal applications are consistent with the policy statement to assist carriers in applying for new authority.[11]

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[10] No party takes exception to our position that the final regulations adopted in this proceeding should be consistent with the policy statement in Ex Parte No. 55 (Sub-No. 43A).

[11] Several issues, such as the appropriateness of using the two-digit Standard Transportation Commodity Code (STTC) classification to devise broad general commodity description, are discussed at length in Ex Parte No. 55 (Sub-No. 43A). Accordingly, those issues will be discussed only briefly in this decision.

Substantive Considerations

The Congress has now spoken out clearly as to the undesirability of narrowly drawn authority and unreasonable restrictions. It has given us the responsibility for establishing procedures for eliminating objectionable restrictions.

As noted above, the terms of the statute leave to the Commission broad discretion as to the procedures to be adopted and the substantive decisions made under those procedures. We are to establish procedures for the removal of restrictions against service at intermediate points on the routes of regular-route carriers, and we are to provide round trip authority where only one-way authority exists. 49 U.S.C. 10922(h)(B)(ii) and (i). In all other respects, the statute gives the Commission discretion to determine what restrictions and forms of authority are unduly narrow. We are to "reasonably broaden" commodity authorizations; to eliminate "unreasonable or excessively narrow" territorial limitations; and to eliminate any other "unreasonable" restriction that we deem "wasteful of fuel, inefficient, or contrary to the public interest."

The comments we received largely support our proposed framework for handling substantive decisions under the rules (using "preliminary finding") as a reasonable approach given the time limits under which we must process restriction removal applications. The comments generally support our preliminary determination as to the types of authority which could be broadened and restrictions which could be removed under the rules to be adopted. Most believe, as we do, that our mandate in Section 10922(h) is to be read broadly, and in concert with the balance of the legislation which recognizes the benefits of competition. However, some commentors

take exception to our fundamental view of Section 10922(h), our proposed use of preliminary findings, and the specific provisions of our guidelines. Most commentors, expressing disagreement with our proposed rules, however, limit their opposition to our proposal on one or various aspects of the guidelines for determining applications.

Overall, these comments lead us to confirm our proposal, and we will adopt the rules proposed under Subpart C—Guidelines for Determining Applications, with minor modifications discussed in the body of this decision.

A. *Use of Preliminary Findings*

Our proposed rules include guidelines (termed "preliminary findings") indicating examples of particular restrictions which the Commission believes should appropriately be removed pursuant to the procedures being adopted. We use the term preliminary findings, because our guidelines would merely provide guidance to the public rather than act as a final determinant of a particular application. We noted in our previous notice that we consider it essential that we provide guidelines because of the time limits under which we must process restriction removal applications.

The MCLA, C & H Transportation, *et al.*, and Arrow Truck Lines, Inc., argue that the Commission is in effect making general findings of public convenience and necessity or public interest in a rulemaking proceeding, thus violating the statutory proscription against master licensing in 49 U.S.C. 10922(b)(2) and 10923(b)(6).

On the other hand, William J. Monheim argues that it is imperative that the Commission provides

guidelines and examples for the filing of restriction removal applications. The ATA, while questioning the use of the term "preliminary findings" in light of the proscription against "general findings", expresses its support for our concept. The other comments we received do not dispute our use of guidelines, but rather, comment on specific restrictions to be included or excluded within the guidelines.

The charge that we are engaging in master licensing is unfounded. First, we are not making findings that a grant of the application is consistent with the public convenience and necessity or in the public interest. The proscription against making general findings is applicable only to proceedings under the two above-mentioned sections. It is not applicable to, for example, motor carrier or broker of passenger licensing. Second, in any event, we will be determining applications on a case-by-case basis as required by the statute. As we emphasized in our previous notice, the rules would require the submission by applicants of information related to the Section 10922(h)(2) criteria. Parties would have the opportunity to comment or rebut the preliminary findings as they pertain to an individual application. Master certification, which was the subject of the Congressional concern reflected in section 5(a) of the Motor Carrier Act, was a specific procedure, well understood by the Congress as, for example, reflected in the now-abandoned proceedings in Ex Parte MC-135, adopted by the Commission in the past which, in essence, foreclosed the litigation of certain public interest issues in subsequent application proceedings. As adopted by the Commission in the past, Master Licensing was, in essence, a proceeding which foreclosed the litigation of public convenience and necessity issues in subsequent application proceedings. We are not fore-

closing the litigation of any issue in response to individual applications. In prohibiting the Commission from making findings relating to public convenience and necessity based on general findings developed in rulemaking proceedings the Congress did not, in our judgment, intend to restrict our authority to engage in the conventional type of guidance to the public which is a traditional function of administrative agencies.

Overall, we find support for our use of guidelines as a reasonable approach to handle substantive decisions under the regulations. This approach will enable us to meet our statutory mandate to process individual applications in 120 days. Accordingly, it will be retained in the final rules.

The balance of this section of our decision will discuss the substantive decisions to be made under the restriction removal procedures.

B. *Fitness Considerations*

Our proposed and final § 1137.10(b), which lists the information that must accompany the application, does not require the submission of information concerning the applicant's fitness or ability to receive a grant of authority. We do, however, conclude that a recent finding by the Commission of a carrier's unfitness on safety grounds will be considered as a factor in granting or denying that carrier's restriction removal applications. The issue can be raised by commentors or the Commission on its own initiative.

We stated in our previous notice at 120:

> As we read the new legislation, a finding of fitness is not a prerequisite to a grant of an application seeking restriction removal under these procedures. Applicants have previously

> been found fit to receive the certificates or permits which they seek to reform, and a further fitness finding does not appear necessary in the absence of a specific statutory requirement.

We did, however, note that Section 10922(h)(2) requires the Commission to consider several criteria in granting or denying applications, one of which is the transportation policy set forth in section 10101 (a)(7). That policy includes improving and maintaining a sound and safe motor carrier system. Accordingly, we sought comments on whether a recent finding of a carrier's unfitness on safety grounds should be considered as a factor in granting or denying that carrier's restriction removal application.[12]

The comments we received on the issue of fitness generally take one of three positions. Several parties[13] argue that the same fitness finding must be made under these regulations as those required under ordinary licensing proceedings for new operating rights. The New Orleans Traffic and Transportation Bureau takes the position that we should require evidence of a carrier's financial ability to conduct any broadened authority it seeks under these rules. Finally, several parties[14] argue that, while the Commission is not required to make a fitness finding in each application for restriction removal, a carrier's unfitness on safety grounds should be considered as

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[12] In a concurring opinion, Commissioner Clapp requested comments on "whether more than just a safety analysis should be required."

[13] The MCLA, Nelson & Harding, Celeryvale Transport *et al.*, and C & H Transportation Co., Inc., *et al.*

[14] The ATA, The Teamsters Union, American Cyanamid Company, Arrow Truck Lines, Inc., and William J. Monheim.

one factor in determining applications filed under these regulations. We find ourselves in agreement with this last position.[15]

We base our decision that no fitness findings are required principally on the two significant factors set forth in our previous notice, and cited above. No party provides a convincing argument as to why we should ignore the lack of a statutory requirement for a fitness finding, and the fact that all applicants under these rules will have been found fit to operate in the Commission proceeding in which they obtained their underlying operating rights, and make a fitness finding a prerequisite for a grant of a restriction removal application.

We are persuaded, however, that there might be circumstances where a carrier's unfitness on safety grounds should bar it from removing restrictions or expanding authority. Parties will be able to raise the issue with specific, rather than general, statements concerning the particular restrictions removal application. As alluded to earlier, the Commission could also raise the issue on its own initiative.

In this area, we observe that, while our directive to maintain a safe and sound motor carrier system is included in the National Transportation Policy (49 U.S.C. 10101(a)(7)), that policy also includes other relevant directives such as to allow the most productive use of equipment and energy resources. These other directives, as well as the other factors we are to consider in rendering our decisions in restriction

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[15] We do, however, reject the ATA's contention that prior or pending findings of unfitness based on safety factors should effect a blanket disqualification of a carrier from receiving the benefits otherwise available under Section 10922(h).

removal cases, might, in certain cases, outweigh a carrier's past safety violations.

Finally, we can see no reason to require an applicant under these regulations to submit financial information on its ability to conduct any expanded authority sought, as the New Orleans Traffic and Transportation Bureau proposes. As we have stated, a fitness finding (safety or financial) is not required by the statute. Moreover, imposing such a requirement here would run contrary to our decision in adopting final rules in Ex Parte No. 55 (Sub-No. 43), to delete the requirement that applicants for new operating rights file financial information concerning their ability to conduct the operations they propose. As we note in that proceeding, bankruptcy laws and the insurance requirements imposed on carriers serve as adequate protection to the public in cases where existing carriers go out of business.

C. *Commodity Descriptions*

We proposed in § 1137.21(b) to allow carriers holding authority framed in terms of one or a limited class of commodities, to replace that description with a broad, generic one. To accomplish this, we proposed that carriers be given the choice of replacing unduly narrow authority with (1) the appropriate two-digit STCC level; (2) a commodity description contained in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 (1952) and 766 (1953); or (3) a broad class description (we provided several examples). We sought comments concerning the possible use of the STCC in reforming narrowly drawn authorizations.

A number of parties which had expressed disagreement with the proposal in Ex Parte No. 55 (Sub-No. 43A) to use STCC for all future requests for new

authority, reiterated their position in this proceeding.

In our final policy statement in Ex Parte No. 55 (Sub-No. 43A), we have concluded that the STCC approach should not be adopted as an exclusive and comprehensive listing of permissible descriptions for all future operating rights applications. Rather, the STCC, as modified in that proceeding, will be used as an indication of the kinds of broad, generic commodity descriptions we find generally acceptable. Any other description proposed by a carrier will be considered acceptable if it is as broad or broader than STCC groupings.

We believe that our proposal in this proceeding regarding broadening of existing commodity authorizations is perfectly consistent with our conclusions as to the proper breadth of future commodity descriptions. Accordingly, we will affirm our preliminary determination to give carriers seeking broadening of their commodity authorizations the option of choosing an applicable classification from one of the three categories described above. Frankly, we do not believe our determination in this area of restriction removal to be contentious. No carrier will be forced to reform its commodity authority. If such a decision is made, however, it makes little sense to allow a carrier to seek a commodity classification which is narrower than the kinds of descriptions found in the three sources we have discussed.

Section 1137.21(a) concerns the exceptions in outstanding general commodities authority. Grants of general commodities authority have in the past consistently excepted certain commodities.[16] We proposed

[16] These included commodities in bulk, those requiring special equipment, commodities of unusual value, classes A

that all of the past commonly imposed exceptions to such authority, except household goods and classes A and B explosives, be susceptible to removal under the procedure to be adopted.

We have decided that our final rule will provide that all exceptions, except classes A and B explosives, will be subject to removal under these procedures. This is consistent with our decision in Ex Parte No. 55 (Sub-No. 43A), concerning future grants of general commodities authority.

Steere Tank Lines opposes our proposal to include the "in bulk" exception. It argues that general commodities carriers have not in the past provided tank-truck service and have no desire to do so.

We cannot agree with Steere's proposal. We believe that its request runs contrary to the National Transportation Policy to encourage competition. While it may be true that many general commodities carriers do not operate tank trailers, nothing is gained by limiting a carrier's ability to expand its operations, if it chooses to do so. To limit authorities merely because a carrier does not already have special equipment would only tend to entrench existing carriers contrary to the new Act.

Regarding household goods, we were concerned that the pending Household Goods Act of 1980, would establish an exclusive licensing category for household goods. That Act, as finally passed, did not set up separate licensing standards for household goods. Since there was no other reason to exclude household goods from the other exceptions which will be subject to removal under these rules, we will not do so.

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and B explosives, and household goods as defined by the Commission.

Classes A and B explosives will not be subject to removal because of safety reasons.

Part (c) of Section 1137.21 involves commodities dealt in by a particular business. In our previous notice, we solicited comments on our preliminary determination that the description "such commodities as are dealt in by" a particular industry is to be considered acceptably broad authority, and thus not susceptible to broadening under these rules. This is because the holder of such authority can transport a broad range of commodities which satisfies the needs of the relevant shipping public and the carrier. All the comments which addressed this issue were in agreement with our position. Accordingly, we affirm our treatment of this issue. Of course, a carrier holding such authority can use the normal application procedures to broaden its authority.

D. *Round-Trip Service*

As we have noted, one of the two explicit instructions we have in this area is to "provide round-trip authority where only one-way authority exists." 49 U.S.C. 10922(h)(1)(B)(iii). In discussing this provision in our previous notice, we expressed our concern that granting carriers "mirror image" authority would frequently have little practical effect in achieving two-way loaded movements. We suggested the possibility that carriers requesting backhaul authority under the rules would receive authority (if so requested) to transport materials, equipment, and supplies used in the manufacture, sale, and distribution of the already authorized outbound commodities in addition to those outbound commodities. We solicited comments on the methods for expanding the commodity description beyond the mere mirror image.

Many commentors concur with our assessment that granting carriers "mirror image" authority probably would do little to further the goals of Section 10922 (h). Most parties agree with our proposal to include complementary return authority as express authority.[17]

The ATA suggests that all items contained in the descriptive language "materials, equipment, and supplies . . ." be considered as being subsumed within the scope of a related generic classification, thereby making express language unnecessary. We agree with this concept and believe it to be better than our above-described proposal. The final rules will state that complementary authority (e.g. materials, equipment, and supplies) will be included as implied authority when a carrier requires round-trip authority, based on our findings of need for the authority expressly granted.

This approach is consistent with decision in Ex Parte No. 55 (Sub-No. 43A) that materials, equipment, and supplies will now be included as implied authority in future grants of authority. This will allow carriers to provide a complete service, with the ability to transport all items used in the manufacture or distribution of a group of commodities, as well as the commodity itself. Also, inclusion of these commodities within a class of commodities is consistent with Congress' expressed interest in facilitat-

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[17] The Department of Transportation (D.O.T.) suggests several alternative approaches to expand backhaul authority, such as allowing carriers to pick up shipments anywhere within a certain radius of the terminating point of any fronthaul or deliver backhauls to points within a certain radius of the originating point of any fronthaul.

ing round-trip authority and eliminating fuel inefficient operations.[19]

To summarize, where a carrier holds one-way authority, it can obtain round-trip authority under these rules. The carrier can either maintain its present authority description or expand its commodity in the manner described in Section 1137.21.[20]

Implied in the commodity description is authority to transport the already authorized commodity (or the expanded authority) in addition to materials, equipment, and supplies, in *both directions.*

E. *Intermediate Point Service*

Two issues have been raised in the comments in connection with our proposed Section 1137.22—Intermediate Point Service. First, Woodline Motor Freight, Inc., takes the position that, where an application involves the removal of restrictions against service to intermediate points, the Commission *must* permit the removal of such restriction. Second, Allied Chemical Corporation proposed that we grant intermediate point authority under these procedures in connection with irregular route authority.

Section 1137.22 will be adopted as proposed. However, we believe it necessary to discuss the issues raised in this area.

As to the first issue, we disagree with Woodline's interpretation of the statute. As we have noted, the statute gives us specific direction in two substantive areas. We are to establish procedures for the removal

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[19] H. Rept. 96-1069, 69th Cong., 2d Sess. 17-18 (1980).

[20] This responds to the question raised by the D.O.T. as to whether authority could be expanded in conjunction with obtaining round-trip authority under our rules.

of restrictions against service on the routes of regular-route carriers, and we are to provide round-trip authority where only one-way authority exists. 49 U.S.C. 10922(h)(1)(B)(ii) and (iii). However, nothing in Section 10922(h)(2) suggests that the Commission is to have no discretion to deny an application seeking the removal of restrictions against service to intermediate points, as Woodline contends. To the contrary, Section 10922(h)(2) uses the language, "In granting or denying applications under paragraph (1)(B) of this subsection, the Commission shall * * *." Paragraph (1)(B) includes applications concerning intermediate point authority. Accordingly, we conclude that applications involving intermediate point authority must be treated identically to the other categories in section 10922(h)(1)(B).

As to the second issue, policy consideration aside, we believe that it would be exceeding our mandate to grant intermediate point authority in connection with irregular-route authority. Allied Chemical correctly observes that we have consistently ruled that intermediate points are not granted for irregular-route authority. More importantly, we are convinced that the language used by the Congress that we implement regulations to "authorize transportation or service to intermediate points on the *carrier's routes*" (emphasis added) read in conjunction with the fact that the Commission does not authorize "routes" to irregular route carriers, is dispositive of the intent of Congress in the area of intermediate point authority.

F. *Territorial Descriptions*

Our preliminary determination, expressed in § 1137.24(a), was that authorizations to serve a ter-

ritory less extensive than a county would be considered excessively narrow. Our proposed rules stated that use of these procedures would be normally appropriate for applications seeking the expansion of territorial authority to include all points in the county in which the authorized service point (including any portion of the commercial zone of an authorized point) or other limited service area is located. Comments were sought on the possibility of allowing applicants, at their discretion, to seek expansion of smaller authorities to embrace a given city and points in its commercial zone, as an alternative to a county.

None of the comments express any serious reservations with our use of county-wide authority as the basic method for expanding excessively narrow territorial descriptions. Nor do we see any problems that have been raised concerning our definition of "county" in Section 1137.3(a). No alternative has been suggested to the use of counties for this purpose. Furthermore, we have decided in Ex Parte No. 55 (Sub-No. 43A) that countywide authority will generally be considered as the minimum territorial description which will be acceptable for future applications.

No party specifically opposes our proposal to allow applicants the option of choosing authority to embrace a city, as an alternative to a county. Accordingly, we conclude that, where a service point is within both a county and a city, we will allow the applicant, at its discretion, to apply for the city description (which includes the implied authority of points in its commercial zone). We recognize that the city description can sometimes produce a broader grant of authority than would county-wide authority, and we believe that this result would be fully con-

sistent with the legislative intent in allowing carriers holding narrow territorial authorities to expand their authorities.

Southern Freight Lines, *et al.*, raises the issue of whether a carrier authorized to serve various counties in a State can use these procedures to obtain statewide authority. We believe that such an expansion of authority is outside the scope of restrictions removal. Carriers in such a position are encouraged to use the normal application procedures to expand and consolidate their authorities.

In our previous notice we raised the issue of how we should handle those instances where a carrier has authority to serve a broad territory limited to service at the facilities of a specified company whose locations are not stated in the certificate. Our preliminary conclusion was that we would not consider such limitations excessively narrow and, therefore, not appropriate for restriction removal. We noted in this regard, that removal of such limitations could require an extensive fact-finding effort which may be impossible given the limited time we have to process restriction removal applications.

The comments we received support our proposed treatment of this type of territorial limitation, and we will adopt our proposed rule. Carriers holding authorities with such limitations can expand their authorities through the normal application procedures.

We note that D.O.T. suggests that we treat carriers with such authority in a manner analogous to procedures for contract carriers in § 1137.26. It suggests that we grant these carriers authority to serve the named shipper between points in the United States. We believe the proper method to accomplish this is for the carrier to request contract carrier au-

thority, which, if granted, would result in a territorially unrestricted authority.

Finally, no serious argument has been made against our proposal in subsection (b) that carriers holding authorities limited to a particular business' facilities at named points be able to use the regulations to offer broader authority to the same extent as other authority containing unreasonable or excessively narrow territorial limitations. We will, accordingly, maintain this provision in our final rules.

G. *Limited-Term Authority*

Under Section 1137.22 we proposed allowing carriers holding limited-term authority to participate fully in the restrictions removal program. Any limited-term authority modified under this program would be limited to the same term imposed in the original authority. Carriers would not be able to use these rules to eliminate the limited-term conditions.

We will maintain this provision in the final rules.

The MCLA states that only carriers holding authority limited because of the nature of the commodities they transport (generally explosives or hazardous commodities) be allowed to participate in the restriction removal program. They argue that otherwise we may allow unsafe carriers to expand their operations. Of course, the type of limited-term authorities the MCLA describes is by far the most prevalent. However, we believe that a better view is to allow all carriers to file restriction removal applications. First, as we noted above in our discussion of fitness issues, safety issues can be raised by commentors or by the Commission on its own initiative. Second, carriers holding limited-term authority are already operating and there is a mechanism in place for the Commis-

sion to evaluate such carriers' performance records under their original and any reformed authority. A grant of a restriction removal application may allow them to operate more efficiently and economically.

H. *Contract Carriers*

We have reworded the text of § 1137.26 for purposes of clarity. The final section on contract carriers will clearly indicate that a contract carrier holding a permit to serve a single named shipper, number of shippers, or a class of shippers can use these rules to obtain authority to serve those shippers "between points in the United States." Also, to eliminate apparent confusion, the final section will state that contract carriers may use these procedures to the same extent as common carriers to eliminate restrictions or to broaden unduly narrow commodity authorizations.

In Ex Parte No. 55 (Sub-No. 43A) we have observed that the proper territorial request for a contract carrier permit is "between points in the United States." We reached this conclusion, because the Commission by law cannot limit the territorial scope of contract carrier operations. As stated above, we will affirm our proposal to give contract carriers holding outstanding permits the same opportunity to obtain nationwide authority.

Brink's Inc., a contract carrier, has requested that we allow contract carriers authorized to serve a single named shipper to use these rules to expand their authority to a class of shippers. We must conclude that these procedures are not an appropriate vehicle to broaden the number of shippers a contract carrier can serve. Such applications would in many instances require an extensive fact-finding effort concerning whether there is a need for service, which may be im-

possible given the statutory time limits imposed on applications filed under the restriction removal procedures. Contract carriers can, of course, expand their authority in such a manner through the final expedited application procedures promulgated in Ex Parte No. 55 (Sub-No. 43).

I. *Miscellaneous Restrictions*

In § 1137.25 of the proposed rules we described "miscellaneous" restrictions which we believed would be susceptible to removal under the restrictions removal program. We solicited comments on other restrictions which should be included in this list.

Our final § 1137.25 will adopt the four types [20] of restrictions we proposed, with some changes made in light of the comments we received. We have also added two types—freight forwarder bills of lading restrictions and territorial service limitations on irregular route authority. These are discussed later in this decision. Based on the comments we received, and our preliminary determination, we will not include authority limited to transportation services for the United States Government because such authority is appropriately broad.

1. In subsection (1), we included restriction which "require or preclude the use of a specific type of equipment, such as 'in tank trailers' or 'except in dump or hopper type equipment'."

A number of parties [21] basically argue that equip-

[20] The fifth type was "restrictions which the Commission found to be inappropriate and has refused to impose on another proceeding.

[21] These include the National Tank Truck Carriers, Inc., the ATA, the MCLA, the New Orleans Traffic and Transportation Bureau, and William J. Monheim.

ment restrictions are not anticompetitive, but rather reflect the "natural" divisions present in the motor carrier industry.

We believe that equipment restrictions generally prevent carriers from expanding their operations to provide an efficient and competitive service to the public. The only reason we can see for not permitting carriers to remove such restrictions under normal circumstances would be to limit competition by isolating various types of specialized carriers. As we have noted earlier in this decision, the maintenance of the "status quo", or limiting future competition, are not valid reasons for excluding unreasonable restrictions from removal in this program. Furthermore, we have decided in Ex Parte No. 55 (Sub-No. 43A) that equipment restrictions will not be imposed in future application proceedings.

2. In subsection (2), we included restrictions which "prevent a common carrier from participating in joint-line service with another carrier or from handling traffic having a prior or subsequent movement by a specified mode of transportation." The proposal was based on our belief that such restrictions were generally wasteful of fuel, inefficient, contrary to the public interest, and frustrating to Congressional efforts at encouraging intermodalism.

Several issues have been raised which are relevant to this subsection. Georgia Highway Express (GHE) questions whether the prior or subsequent movement aspect of our subsection could be interpreted to cover only restrictions which *prevent* a carrier from handling traffic having a prior or subsequent movement by rail, air, or water (commonly referred to as ex-rail, ex-air, and ex-water transportation).

GHE requests the Commission explicitly to sanction in this subsection applications seeking to remove restrictions limiting the carriers to ex-rail traffic. GHE desires to remove such a restriction so that it may perform joint-line service with other motor carriers. The Air Freight Motor Carriers Conference (AFMCC) wants to be certain that ex-air restrictions are embraced in subsection (a).[22]

GHE and AFMCC basically argue that enabling the removal of intermodal restrictions generally would have a favorable impact on fuel consumption, would yield operating efficiencies, and would be in the public interest.

We agree that authorities which restrict traffic to, or against, movement with a specified mode of transportation are objectionable and should be embraced in this subsection. We also agree that ex-air motor traffic should be included. This is also in keeping with the mandate of the National Transportation Policy that the Commission encourage intermodal transportation. See 49 U.S.C. 10101(a)(7)(H). These matters are reflected in our final rules.

The second issue concerns the ability of railroad-controlled motor carriers to use the restriction removal program. Seaboard Coast Line Railroad Company and Seacoast Transportation Company, its wholly owned motor carrier subsidiary submitted a joint comment. They urge that in order to promote intermodal competition according to the amended Na-

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[22] AFMCCC notes that, while 49 U.S.C. 10527(b)(8)(B) exempts almost all ex-air motor traffic from Commission jurisdiction, ex-air traffic performed in conjunction with a foreign air carrier that has not reached an appropriate agreement with the United States still requires specific operating authority from the Commission.

tional Transportation Policy, it is necessary to treat railroad-controlled motor carriers the same as independent motor carriers.

We believe that the issue of whether restrictions imposed pursuant to Section 11344(c) should be removable under the restriction removal program are better considered in a separate proceeding. Under the statutory proviso of 49 U.S.C. 11344(c) [23] where railroads seek to consolidate or merge with, or acquire control of a motor carrier, such a transaction cannot be approved unless the Commission finds that it will be consistent with the public interest, enabling the rail carrier to use the motor services in its operations to public advantage without unreasonably restraining competition. In implementing this statutory provision, the Commission has in the past required the imposition of special restrictions [24] on grants of motor carrier authority to a railroad or railroad affiliate so as functionally, as well as geographically, to limit the motor carrier service to that auxiliary of or supplementary to rail service. We are examining these matters separately.[25]

3. In subsection (3), we proposed including restrictions which "impose size or weight limitations on

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[23] Former Section 5(2)(b) of the Interstate Commerce Act.

[24] These restrictions include "key points," "auxiliary and supplementary," and "interchange" restrictions.

[25] Insofar as the carriers concern centers on intermodal traffic, we note that two pending rulemaking proceedings involve intermodal issues. See Ex. Parte No. 230 (Sub-No. 5), *Improvement of TOFC/COFC Regulation*, 45 FR 79123 (Nov. 28, 1980); and Ex Parte No. 287 (Sub-No. 7), *Special Intermodal Authority*, 45 FR 77032 (Nov. 21, 1980), and 45 FR 79488 (Dec. 1, 1980).

a specified commodity or limited class of commodities." We will adopt this provision in the final rule. The MCLA has asked for a clarification of this provision. To clarify our rule, size or weight restrictions which are descriptive and contain the sole limitations on the commodity that may be transported, such as "shipments weighing less than 100 pounds" or the normal "size and weight" description of heavy haulers, are not considered objectionable and will not be removable under these rules. On the other hand, limitations on the size of individual articles or a class of commodities to be shipped will be covered by subsection (3).

4. Subsection (4), of the proposed § 1137.25 concerned outstanding authorities which are restricted to (1) the transportation of traffic originating at or destined to specific points in Canada, or Mexico, and (2) specific point of entry on the international boundary line between the United States and the two neighboring countries.

We observed in our previous notice that we had issued a revised policy statement advising the public that the Commission would not impose such foreign commerce restrictions in the future and that such restrictions in authority issued after March 3, 1975, were null and void. Also, we noted that this policy statement was found unlawful in *American Bus Association v. ICC*, 627 F.2d 525 (D.C. Cir. 1980) due solely to the Commission's failure to provide notice and take comment pursuant to 5 U.S.C. 553.

The Trucking Association of Quebec, *et al.*, argues that the requirement for a carrier to specify the port of entry to be used is not a restriction, but rather, the functional equivalent of a grant of authority to a named origin or destination point in the United

States. It argues that the naming of specific ports of entry does not impede the free flow of commerce.

We disagree and we will affirm our preliminary determination that the above-described foreign commerce restrictions impede the free flow of international trade, cause operating inefficiencies, and are contrary to the public interest. Accordingly, we will retain this provision in Section 1137.25.

The ATA asks that we clarify the practical effect of removing ports-of-entry restrictions through these regulations. We will attempt to do so. Where a certificate describes a specific port of entry, or ports of entry along the international boundary line within a State, and one restriction as removed, the certificate will authorize service to and from all ports of entry in the involved State. This will allow the carrier to use any convenient port of entry in the State.

5. As we have mentioned above, we will include a new subsection in § 1137.25 to include freight forwarder bills of lading restrictions as a type of restriction which could normally be removed under the restriction removal program. We solicited comments on this proposal in our previous notice.

Midwest Haulers, Inc., a motor carrier of general commodities, specializing in the transportation of traffic for freight forwarders, supports our proposal. Midwest Haulers contends that the involved restriction contributes to wasteful utilization and operating inefficiency. Because the restriction prevents it from moving non-forwarder traffic in its authorized traffic lane, which it could otherwise handle with its equipment, the restriction stifles its ability to meet the needs of shippers and make more productive use of its equipment.

Brannan Systems, Inc., *et al.*, argues that there is nothing to show or suggest that such limitations are

unreasonable restrictions which are wasteful of fuel, inefficient, or contrary to the public interest. It states that there is no legislative history to suggest that Congress intended the elimination of this type of restriction.

We conclude that freight forwarder bills of lading restrictions fall within the ambit of Congress' intent concerning restriction removal. We are convinced that these restrictions are unreasonable because they result in operations that are wasteful of fuel, inefficient, and contrary to the public interest. The only reason for not allowing carriers to remove this restriction under normal circumstances would be to protect existing general freight carriers from competition, which would be contrary to the National Transportation Policy. We also note that the Commission has in the past rejected imposition of bill of lading restrictions. See *North Star Transport, Inc., (Extension—Lumber*, 128 M.C.C. 803 (1978), aff'd mem. sub nom. International Transport, Inc. v. *I.C.C.*, 607 F.2d 493 (D.C. Cir. 1979).

6. In response to our request for comments on possible additions to § 1137.25, Mercury Motor Express, Inc., raises the issue of service restrictions imposed on irregular-route authority.

Mercury Motor observes that the Commission has granted irregular-route authority between areas or between States restricted to movement through a named point, area, or State. For example, "between points in Tennessee, on the one hand, and, on the other, points in Florida . . . limited to the transportation of traffic moving from, to, or through points in North Carolina."

This type of restriction serves to limit the service that the carrier can offer the public, and normally will result in operating inefficiencies and excessive

fuel consumption. As such, we conclude that the described type of restriction should be included in § 1137.25, as a restriction which could normally be removed under the regulations.

7. As we noted in our previous notice, our guidelines are not intended to be an all-inclusive list of the restrictions which can be removed under the procedures we are adopting. Accordingly, we will include in our final rules [at 1137.25(7)] our proposed subsection (5), restrictions which "the Commission has found inappropriate and has refused to impose in another proceeding."

Miscellaneous Matters

A. *Repeat Applications*

Section 1137.10 has been amended to specify that a carrier may reform authority (granted pursuant to applications filed before December 28, 1980), more than once under these rules. We see no reason to give a carrier only "one bite of the apple". However, we strongly encourage carriers carefully to analyze their authority and their needs before filing a restriction removal application. Also, a carrier should not file a request to have a certificate or permit reformed until the prior request related to that authority has been processed by the Commission. Given the time limits under which we must operate, this should not cause any undue hardship.

B. *Compliance*

We have added a new § 1137.15 to the rules dealing with compliance. The purpose of the addition is to indicate that where a restriction removal application is granted, a new certificate or permit will be

issued without prior verification of the normal compliance requirements (rates, process agents, and insurance). Before commencing operations under the newly issued authority, a carrier must, of course, comply with the pertinent statutory and regulatory requirements. This is the same procedure which we have adopted in Ex Parte No. 55 (Sub-No. 43) at 45 FR 80109 (1980).

The ATA suggests that in cases where no party files comments to a restriction removal application, a carrier should be allowed to begin operating immediately at the close of the 20th day after the due date for filing comments. They express their concern that in the past substantial delays have been experienced by carriers while awaiting issuance of a certificate. Since we have no experience under the new law and are unable to predict the number of filings, we share their concern. However, we believe that the best course is to follow the procedure we have outlined. Long delays have occurred in the past largely as the result of the Commission awaiting verification of carriers' compliance with applicable requirements. Under our procedure, we expect that in uncontested proceedings, reformed authority could be issued shortly following the conclusion of the 25 day comment period. However, we stand ready to reexamine our procedures should an inordinate number of filings cause lengthy delays.

C. *Filing Fees*

A number of parties have suggested that we eliminate or reduce the filing fee for restriction removal applications. One commentor, the Aluminum Association, Inc., suggests that we have a sliding scale of filing fees tied into the class of carrier filing the

application. The question of filing fees has complex policy implications which should be answered on a separate basis. For the time being, we will retain the $350 filing fee in our final rules.

D. *Application Procedures*

As we have stated in the past, carriers seeking to reform their authorities by consolidating a number of fragmented authorities into one or more certificates and simultaneously to remove restrictions are encouraged to use the expedited application procedures promulgated in Ex Parte No. 55 (Sub-No. 43). See 45 FR 45535-6 (1980). Numerous carriers have filed applications to reform their authorities in such a manner.

Energy and Environmental Considerations

In our previous notice we stated that we did not believe that adoption of the proposed rules would have any significant impact upon the quality of the human environment. We also stated that we anticipated that their adoption would improve operating efficiencies and reduce mileage, thus contributing to the conservation of energy resources. We solicited comments on the issues of environmental and energy considerations.

We affirm our previous statements on both issues. We received only one substantive comment on these issues. D.O.T. cites a report issued by that Agency [26] which found that if the restrictions involved in this proceeding and in Ex Parte No. MC-142 were re-

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[26] Final report of D.O.T. entitled "Potential Fuel Conservation From Regulatory Reform of the Trucking Industry" (July 1980).

moved, annual fuel savings of at least 30 to 60 million gallons could be anticipated.

Our Office of Policy and Analysis—Energy and Environmental Branch, has prepared an Environmental Assessment and Statement of Energy Impact, which are found in Appendix B of this document. The first statement concludes that the quality of the human environment will not be affected significantly by this action. In fact, the environmental impacts (including energy consumption) of the proposed rules is expected to be slightly beneficial. The second statement concludes that, by permitting a slight improvement in load factors and a reduction of empty mileage, the proposed rules are expected to induce a modest reduction in energy consumption.

Three factors figure significantly in our consideration of the environmental implications of our action. First, as noted above, these rules are essentially procedural and are intended to implement a Congressional directive that we are to establish procedures to allow carriers to eliminate certain restrictions and to broaden unduly narrow authority. Second, the Congressional mandate resulted to a large extent from finding that many restrictions imposed by the Commission in the past often result in operational inefficiencies and wasted fuel.[27] Third, these regulations provide for the proper consideration of environmental and energy issues in individual restriction removal applications. These issues can be raised by the parties to a proceeding or by the Commission on its own initiative.

We cannot agree with the MCLA's contention that the Commission's regulations specifically mandate publication of environmental and energy statements

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[27] House Report, *supra*, at 6.

in a notice of proposed rulemaking. We are convinced that our consideration of environmental and energy implications of the regulations being adopted is in full compliance with the National Environmental Policy Act of 1969, the Energy Policy and Conservation Act, and the Commission's regulations implementing these Acts (49 C.F.R. Parts 1108 and 1106).

Alternative Procedures

In establishing these regulations for the elimination of restrictions, we emphasize that carriers continue to have available the conventional application procedures authorized in Ex Parte 55 (Sub-No. 43). The statutory deadline for Commission decisions with respect to those applications is only 180 days and, in fact, the Commission is processing unopposed applications in approximately 90 days, and opposed applications in less than the statutory 180 days. As a consequence, applicants can receive prompt attention to their applications even in cases which do not qualify under the special provisions applicable to restriction removal. Indeed, in close cases, we encourage applicants to proceed under the conventional certification procedures rather than litigate the metes and bounds of our restriction removal regulations.

Adoption of Rules

Accordingly, we adopt the rules set forth in the Appendices below.

This action is taken under the authority of 49 U.S.C. 10321 and 10922(h) and 5 U.S.C. 553.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Clapp, Trantum, Alexis, and Gilliam. Commissioner Clapp dissenting

in part and concurring in part, and reserving his right to submit a separate expression at a later date.
James H. Bayne,
Acting Secretary.

Appendix A—Revisions to the Code of Federal Regulations, Title 49

Part 1002—FEES

(1) 49 CFR 1002 is revised by adding 49 CFR 1002.2(d)(9) as follows:

§ 1002.2 Filing fees.

* * * * *

(d) * * *

(9) An application to remove a restriction or broaden unduly narrow authority under 49 CFR Part 1137, $350.

(2) 49 CFR Part 1137 is added to Title 49 as follows:

PART 1137—REMOVAL OF RESTRICTIONS FROM AUTHORITIES OF MOTOR CARRIERS OF PROPERTY

Subpart A—General

Sec.
1137.1 Purpose.
1137.2 Applicability of Rules.
1137.3 Definitions.

Subpart B—Procedures

1137.10 Form and Content of Application.
1137.11 Notice.

1137.12 Participation of Interested Persons.
1137.13 Furnishing a Copy of the Application Package to Interested Persons.
1137.14 Disposition of the Application.
1137.15 Compliance.

Subpart C—Guidelines for Determining Application

1137.20 Scope of this Subpart.
1137.21 Commodity descriptions.
1137.22 Intermediate point service.
1137.23 Round-trip service.
1137.24 Territorial authority.
1137.25 Miscellaneous restrictions.
1137.26 Contract carriers.
1137.27 Limited term authority.
1137.28 Availability of other application procedures.
1137.29 Impact of restrictions removal.

Authority: 49 U.S.C. 10321 and 10922(h); 5 U.S.C. 553.

Subpart A—General

§ 1137.1 Purpose.

These regulations govern applications filed by motor carriers of property seeking to remove operating restrictions from their certificates or permits in order to:

(a) Broaden reasonably the categories of property authorized by the carrier's certificate or permit;

(b) Authorize transportation service to intermediate points on the carrier's routes;

(c) Provide round-trip authority where only one-way authority exists;

(d) Eliminate unreasonable or excessively narrow territorial limitations; or

(e) Eliminate any other restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest.

These regulations implement of 49 U.S.C. 10922(h)(1)(B) and 10922(h)(2).

§ 1137.2 Applicability of rules.

Applications may be filed under these rules to remove restrictions or to broaden authority in certificates and permits issued pursuant to applications filed before December 28, 1980.

§ 1137.3 Definitions.

(a) *County.*—"County" means (1) a county in any State, a judicial district in Alaska, and a parish in Louisiana and (2) a city, town, or village in any State which is not administratively part of a county, New York, NY, and Washington, D.C., and their commercial zones as defined by the Commission.

(b) *STCC.*—"STCC" means the Standard Transportation Commodity Code Tariff currently on file with the Commission at any given time.

Subpart B—Procedures

§ 1137.10 Form and content of application.

(a) *Form and filing requirements.*—No application form is prescribed for filing applications under these rules. Applicants shall submit an original and one copy of their applications to the Secretary, Interstate Commerce Commission, Washington, D.C. 20423. Applicants shall also file a copy of the complete application in the regional office of the Commission for the region in which they are domiciled. Applications shall be typewritten or printed on paper measuring approximately 8½ by 11 inches, with a 1½ inch left-hand margin. Only the original need be

signed. A check or money order payable to the Interstate Commerce Commission covering the applicable filing fee must accompany the application. The envelope containing the application and check shall be clearly marked "RESTRICTION REMOVAL APPLICATION". Also each application shall be clearly marked, in the upper right-hand corner of the top page: "RESTRICTION REMOVAL".

(b) *Information which shall accompany the application.*—The application shall contain the following information, in the same order as set forth below:

(1) The exact name and address of the applicant and the docket number assigned by the Commission to the applicant's authorities.

(2) The name, address, and telephone number of applicant's representative.

(3) A copy of the certificate or permit from which applicant seeks to have restrictions removed or which it proposes be broadened.

(4) A proposed draft of the certificate or permit (commodity and territorial descriptions) with the restrictions removed or the authority broadended as proposed, together with sufficient information for the Commission to determine readily the precise portions of the existing authority which applicant proposes be modified. The redrafted certificate or permit shall be in the same format as the original so that, if the application is granted, it can be issued promptly without further redrafting by the Commission.

(5) In the case of an application to remove a restriction of a type found by the Commission to be inappropriate (see § 1137.25(7) of this part), a reference to the Commission decision in which an identical or substantially similar restriction was found inappropriate.

(6) A caption summary (an original and one copy) of the modifications proposed, suitable for publication in the *Federal Register*. The caption summary shall include *an accurate summary of the restrictions applicant seeks removed, the authority applicant seeks broadened under these rules, or the authority the applicant would hold if its application were granted. It shall also include the authority (including specific sub numbers) which would be superseded by a grant of the application. For example, a caption summary could state that, "The application seeks to modify Sub-Nos. 1-10, by broadening the commodity description in the authorities from liquid chemicals to chemicals or allied products; by replacing the plantsite restrictions in the authorities with county-wide authority in X, Y, and Z Counties, IL; and by eliminating the in bulk restriction* in *all of the named authorities.* The caption summary shall be double-spaced on plain white paper (no letter heads). Each summary will be checked by Commission staff for its accuracy and *failure to describe accurately the changes applicant seeks may result in a rejection of the application.*

(c) *Information that shall accompany the application.*—The application shall include a statement describing the effect of the proposal upon one or more of the following factors:

(1) The consumption of energy resources;

(2) Potential cost savings and improved efficiency;

(3) The provisions of the transportation policy set forth in 49 U.S.C. 10101(a); or

(4) The provision and maintenance of service to small and rural communities and small shippers.

(d) *Related restriction removal.*—Applicants are expected to combine reasonably related restriction re-

moval requests or requests for broadening of authority in a single application. Two categories of requests are generally considered related: (1) requests related to the same certificate or permit authority. An example of this category would be a carrier which holds a one-way certificate and desires to obtain backhaul authority as well as to broaden its territorial and commodity authority under these rules. (2) Requests seeking to remove the same restriction, or restrictions having a similar effect, from different authorities. An example of this would be a carrier which desires to remove the same equipment restriction from a number of certificates under these rules. In applications combining requests as described above, each request shall be clearly marked and segregated, and each request shall comply with the requirements set forth in § 1137.10(b) (3), (4), (5), and (6). Failure to comply will result in a rejection of the application. Carriers are free to file consolidated applications which do not fit into the two categories described above.

(e) *Incomplete applications.*—Due to the time limits imposed by 49 U.S.C. 10922(h)(2), the Commission cannot await the supplementing of incomplete applications or make extensive revisions to draft *Federal Register* captions. The failure to submit a complete application or to include a proper caption summary will result in rejection of the application.

(f) *Repeat applications.*—A certificate or permit can be reformed under these rules more than one time. However, a restrictions removal application shall not be filed before a preceding application to reform the same authority has been processed by the Commission.

§ 1137.11 Notice.

Notice to the public of the filing of an application under these rules will be given by the Commission through publication of a caption summary in the *Federal Register*. Applicant shall deliver (by mail or in person) a copy of the caption summary to the State transportation board or official of applicant's domicile. Applicant shall mail a copy of the application to this State board or official or any State through which the operations described in the application would be performed upon their written request. Applicant shall make copies of the application available for public inspection at its principal place of business and at the office of its representative if at a different location. A copy of the application is also available for inspection at the ICC, Washington, D.C., Office of the Secretary.

§ 1137.12 Participation of interested persons.

Any interested person may comment on the applicant's proposal. Comments (an original and one copy) shall be filed with the Commission within 25 days of the date of publication of notice of the application in the *Federal Register*. The envelope containing the comment and the comments shall be clearly marked "RESTRICTION REMOVAL COMMENTS." Comments shall be directed to either (1) the merits of the particular proposal, or (2) whether the proposal should properly be considered under these rules.

§ 1137.13 Furnishing a copy of the application package to interested persons.

Applicant's representative is required to furnish a copy of the application package to interested persons after publication. The request must be in writing and must contain a check or money order for $10, payable to applicant's representative. Applicant's representa-

tive need not supply copies to any person not sending the appropriate payment. Applicant is required to mail the copy within 5 days of receipt of the request. Non-compliance with this section by applicant may result in dismissal of the application.

§ 1137.14 Disposition of the application.

(a) *Basis for determining the application.*—Except in extraordinary circumstances, applications will be determined solely on the basis of the application itself and any comments that are received. There will be neither oral hearings nor the opportunity for the submission of evidence under modified procedure.

(b) *The Commission's decision.*—Applications will be published in the *Federal Register* in the form of tentative decisions granting the authority requested. If no comments are filed, the application will stand granted at the *conclusion of the 25-day comment period,* unless the Commission, prior to that time, stays the effectiveness of the tentative decision.

(c) Administrative finality and appeals.—A decision disposing of an application subject to these rules is a final action of the Commission. Review of such an action on appeal is discretionary and is governed by the Commission's appeal regulations at 49 CFR 1100.98. Any party seeking review should specify the "extraordinary circumstances" involved in the proceeding to enable the Commission to extend the deadline for final Commission action an additional 90 days.

§ 1137.15 Compliance.

A reformed certificate or permit will be issued upon a grant of an application. Prior to beginning operations under the newly issued authority, compliance must be made with the following statutory and regu-

latory requirements: (a) for motor common carriers —49 CFR 1043, 1044, and 1310, and (b) for motor contract carriers—49 CFR 1043, 1044, and 1310.

Subpart C—Guidelines for Determining Applications

§ 1137.20 Scope of this subpart.

This subpart contains guidelines designed to assist applicants in filing applications for the removal of operating restrictions. The guidelines indicate certain types of restrictions or operating limitations in operating authorities which the Commission considers, under normal circumstances, to be excessively narrow, wasteful of fuel, inefficient, or contrary to the public interest. They suggest ways in which some such restrictions might reasonably be eliminated or in which limited authorities might be broadened. The guidelines are not intended to constitute a prejudgment of any individual application.

§ 1137.21 Commodity descriptions.

(a) *General commodities carriers.*—Where a carrier is authorized to transport general commodities, restrictions having the effect of precluding the transportation of classes A and B explosives are not considered unduly restrictive and are not normally subject to removal under these procedures. Other restrictions on the commodities which a general commodities carrier may transport are considered unduly restrictive and may normally be removed under these procedures.

(b) *Named commodities or limited classes of commodities.*—Where a carrier is authorized to transport one or more named commodities, the authority is considered unduly restrictive and may normally be broadened under these procedures. The same is true where a carrier is authorized to transport a limited

class of commodities, except as indicated in subsection (c) of this section. Commodity classes which carry designations of three digits or more in the Standard Transportation Commodity Code are normally considered unduly narrow. Use of these procedures is normally appropriate for applications which seek—

(1) to expand such a commodity authorization to the two-digit STCC level;

(2) to replace such an authorization with a commodity description contained in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 (1952) and 766 (1953); or,

(3) to replace such an authorization with a broader class description generally accepted by the Commission, such as commodities in bulk, commodities which because of their size or weight require special equipment, or oilfield commodities as described in *Mercer Extension-Oilfield Commodities*, 74 M.C.C. 459 (1946).

(c) *Commodities dealt in by a particular business.* —Where a carrier is authorized to transport "such commodities as are dealt in by" a particular industry, such as mail order houses or retail grocery stores, the authority is not considered excessively narrow, and applications for modification should not normally be filed under these procedures.

§ 1137.22 Intermediate point service.

Certificates which authorize regular-route service and preclude service at intermediate points on the carrier's service routes, either by way of a specific restriction against performing such service or by virtue of the fact that they allow service at certain intermediate points but fail to name other points, are considered unreasonably restrictive. Use of these pro-

cedures is appropriate for seeking removal of any restriction or operating condition which inhibits service at intermediate points on a regular-route carrier's service route.

§ 1137.23 Round-trip service.

Certificates or permits which authorize service in one direction only are considered unduly restrictive. Use of these procedures is appropriate for applications which seek return movement authority limited to the same commodities the carrier is authorized to transport on the outbound trip or applications which seek to expand the round-trip authority in a manner described in § 1137.21. Implied in the round-trip commodity description is materials, equipment, and supplies in both directions.

§ 1137.24 Territorial authority.

(a) *Less than county-wide authority.*—Except as indicated in paragraph (b) of this section, authorizations to serve a territory less extensive than a county (including authorizations to serve named facilities or limited in a similar manner) are considered excessively narrow. Use of these procedures is normally appropriate for applications seeking the expansion of territorial authority to include all points in the county in which the authorized service point (including any portion of the commercial zone of an authorized point) or other limited service area is located. Where an authorized service point is located within a given city as well as a county, an applicant can seek expansion of authority to the city (which includes implied authority of points in its commercial zone). Use of these procedures is also normally appropriate for applications to remove restrictions

which preclude service at points or areas smaller than a county.

(b) *Service at facilities not precisely located.*— Where a carrier has authority to serve a broad territory limited to service at the facilities of a specified person, company, or type of business, and where the precise location of the facilities, by reference to a city, county, or the like, is not apparent from the certificate or permit, the limitations are not considered excessively narrow, and applications for modification should not normally be filed under these procedures. These procedures can, however, be used to expand authority limited to a particular business' facilities at named points.

§ 1137.25 Miscellaneous restrictions.

Use of these procedures are normally appropriate for applications seeking the removal of the following types of restrictions, which the Commission considers to be contrary to the public interest.

(a) Restrictions which require or preclude the use of a specific type of equipment, such as "in tank vehicles" or "except in dump or hopper type equipment."

(b) Restrictions which have the effect of preventing a common carrier from participating in joint-line service with another carrier or from handling traffic having prior or subsequent movement by any mode of transportation or type of carrier.

(c) Restrictions which impose size or weight limitations, or both. This does not include restrictions relating to shipments weighing 100 pounds or less under certificates granted under the so-called "fitness only" procedures in 49 U.S.C. 10922(b)(4)(D).

(d) Restrictions which specify Canadian and Mexican destinations or origins to be served, or designate specific port of entry points which must be used.

(e) Restrictions which limit the movements of a common carrier to transportation performed on freight forwarder bills of lading.

(f) Restrictions which limit the services an irregular-route carrier can provide to traffic moving through a named point, area, or State. For example, irregular-route authority "limited to the transportation of traffic moving from, to, or through points in (a specific State)."

(g) Restrictions which the Commission has found to be inappropriate and has refused to impose in another proceeding.

§ 1137.26 Contract carriers.

Where a permit of a contract carrier limits the carrier's territorial scope of service for a named shipper, shippers, or a class of shipper, such authority is considered unduly restrictive. Use of these procedures is normally appropriate for applications seeking to broaden the territorial scope of such permits. Such applications can request authority to serve the single-named shipper, shippers, or class of shippers, "between points in the United States." The commodity description in contract permits can be broadened, and unreasonable restrictions removed, to the extent specified in Subpart C of this Section.

§ 1137.27 Limited term authority.

Certificates and permits limited to specified duration ("term" limitation) can be modified under these procedures to the same extent as authority without a term limitation. Any modified authority approved under these rules will contain the same limitation as the original authority. These procedures cannot be

used to remove the limited term condition from existing authority.

§ 1137.28 Availability of other application procedures.

The provisions of this subpart which describe as inappropriate the use of these procedures for applications seeking the elimination of certain types of restrictions or the modification of certain types of limited authorities should not be consulted as discouraging the filing of applications seeking such relief pursuant to the Commission's normal application procedures under 49 U.S.C. 10922(b) and 10923(b).

§ 1137.29 Impact of restrictions removal.

The Commission has found that, under normal circumstances, the elimination of restrictions or the modification of authorities designated in this subpart as unduly restrictive, unreasonable, excessively narrow, or contrary to the public interest will reduce the consumption of energy resources, will offer potential cost savings and improved efficiency, will be consistent with the provisions of the transportation policy set forth in 49 U.S.C. 10101(a), and will assist in providing and maintaining service to small and rural communities and small shippers.

Note.—Appendix B will not appear in the Code of Federal Regulations.

Appendix B—Environmental Assessment; Removal of Restrictions From Authorities of Motor Carriers of Property

[Ex Parte No. MC-142 (Sub-No. 1]

Summary and Conclusion

The establishment of procedures to expedite removal of operating restrictions, as proposed in Ex

Parte No. MC-142 (Sub-No. 1), would slightly improve on a nationwide basis, energy efficiency and public safety, and reduce air and noise pollution. Although not deemed significant in the context of the National Environmental Policy Act, the enhancement of energy efficiency and environmental quality comport with established national objectives.

1.0 Description of the Proposed Action

The rules proposed in Ex Parte No. MC-142 (Sub-No. 1) would establish a framework for expediting applications to remove excessively narrow operating restrictions in individual carriers' operating authorities. Among the restrictions which could be relaxed or removed under the proposed rules are commodity restrictions, backhaul restrictions, intermediate point restrictions, territorial restrictions, and restrictions on the classes of shippers which can be served.

The restrictions which could be removed under the proposed rules historically may have inhibited carrier efforts to attain maximum operating efficiency. A motor carrier hauling goods from point A to point B cannot pick up an available return load at point B bound for point A unless the carrier has authority to carry the commodity *and* unless the carrier has bidirectional operating authority between points A and B. A motor carrier operating between points C and D cannot fill up a partial load with a shipment bound for an intermediate point unless the carrier has authority to serve the intermediate point and unless the carrier has authority to carry the commodity bound for the intermediate point. These and other restrictions have contributed to depressed load factors which tend to increase vehicle miles and to reduce energy-consumption.

Environmental Impacts

The environmental impacts (including energy consumption) of the proposed rules should be slightly beneficial. Information obtained by the ICC during 1976 in the *Empty/Loaded* survey suggests that a small fraction of trucks are forced to travel empty or partially empty because the ICC operating restrictions. Of the 3032 empty trucks in the survey sample, only 16 were empty because they lacked ICC operating authority.[1] Of the 2007 partially empty trucks in the survey sample, none was partially empty because they lacked ICC operating authority. Based on the survey results, it is not expected that any major savings in vehicle mileage or improvements in load factors will result from the proposed rules. The minor reduction in vehicle mileage and improvement in load factors resulting from the proposed rules will, on a nationwide basis, slightly reduce energy consumption, roadway accidents, air pollution, and noise pollution.

The issues considered in this document were also the subject of a recently completed report entitled "Consequences of Motor Carrier Deregulation on Fuel Efficiency" prepared by Thomas Corsi and Merrill Roberts for the ICC Office of Policy and Analysis. There it was determined that restrictions on motor carrier operating authorities artificially and unreasonably contributed to motor carrier energy inefficiency. It was suggested that removal of such re-

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[1] It should be noted, however, that 1,184 of the empty trucks were on their way to pick up another load. It is possible that a portion of these drivers could have obtained another load closer to the previous destination had ICC authority been available. See Bureau of Economics, Interstate Commerce Commission, *Empty/Loaded Truck Miles on Interstate Highways in 1976*, Washington, D.C. April, 1977.

strictions, in the long run, would enhance energy efficiency within the motor carrier industry. The report of Corsi and Roberts was based to a large extent on studies by others on this and related topics.[2]

Statement of Energy Impact

Removal of Restrictions From Authorities of Motor Carriers of Property

The rules proposed in Ex Parte No. MC-142 (Sub-No. 1) would permit motor carriers of property to amend or eliminate operating restrictions which have impeded operational efficiency. By permitting a slight improvement in load factors and a reduction in empty mileage, the proposed rules will induce a modest reduction in energy consumption.

[FR Doc. 80-40512 Filed 12-30-80; 8:45 am]

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[2] See e.g., Stephen Sobotka and Thomas Domeneich, "Traffic Diversion and Energy Use Implications: Another View," in Paul W. MacAvoy and John W. Snow (eds.) *Regulation of Entry and Pricing in Truck Transportation*, American Enterprise Institute, 1977, p. 198; Drake Sheahan/Stewart Dougall, Inc., *Evaluation of Potential Changes to Federal Economic Regulations Governing Private Carriage*, U.S. Department of Transportation, Washington, D.C. December 6, 1974; and Roland K. Kolins. "The Regulatory Program: The Effect on Entry Backhaul, and Energy Consumption," *Motor Carrier Economic Regulation* National Academy of Sciences, Washington, D.C., 1978, pp. 179-198. Charles River Associates, Inc. and Cambridge Systematics, Inc., *Potential Fuel Conservation Measures by Motor Carriers in the Intercity Freight Market*, Vols. I and II, prepared for Federal Energy Administration, Washington, D.C., April 1977. Domenic J. Maio, *Freight Transportation Petroleum Conservation Opportunities—Viability Evaluation*, U.S. Department of Transportation, Transportation Systems Center, Cambridge, Mass., March 1979, pp. 4-13 to 4-16.

APPENDIX I

49 CFR Ch. X

[Ex Parte No. 55 (Sub-No. 43A)]

Acceptable Forms of Requests for Operating Authority (Motor Carriers and Brokers of Property)

AGENCY: Interstate Commerce Commission.

ACTION: Notice of proposed policy statement.

SUMMARY: Consonant with Congressional intent, as expressed in the Motor Carrier Act of 1980, the Interstate Commerce Commission is proposing to revise the acceptable forms of requests for operating authority for motor carriers and brokers of property. The proposed policy would affect all future motor carrier and broker of property applications. It involves (1) broadening commodity and territorial descriptions, and (2) prohibiting most restrictions. Commodity descriptions would be phrased in terms of the two-digit STCC industry groupings. Territorial authority would require that applicants seek two-way authority only. No plantsite, interlining, commodity, and equipment restrictions would be accepted. The proper forms of requests for "fitness related applications" are also defined.

DATE: Comments are due on or before September 2, 1980.

ADDRESSES: Send an original and 15 copies, if possible, of comments, to: Ex Parte No. 55 (Sub-No. 43A), Room 5316, Office of Proceedings, Interstate Commerce Commission, Washington, D.C. 20423.

FOR FURTHER INFORMATION CONTACT: Peter Metrinko, 202-275-7885 or Laurence Schecker, 202-275-7893.

SUPPLEMENTARY INFORMATION:

Background

Congressional efforts to reduce unnecessary regulation by the Federal Government have resulted in a reevaluation of Federal regulation of the motor carrier industry. The Motor Carrier Act of 1980 (the Act) recognizes the evolution undergone by the trucking industry since the inception of Federal regulation in 1935, and revises the statutory basis of that regulation to reflect the transportation needs of the 1980's.

Review by Congress of the statutes and regulations governing the motor carrier industry has shown that historically the existing regulatory structure has tended to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the trucking industry. The Act amends existing statutes to promote a safe, sound, competitive, and fuel efficient motor carrier system. To that end, the Interstate Commerce Commission is specifically mandated to continue to promote a more efficient and competitive transportation system, within the parameters set by Congress in the amended National Transportation Policy, 49 U.S.C. 10101, and the standards for granting certificates, 49 U.S.C. 10922, and permits, 49 U.S.C. 10923. Additionally, the Commission must take into account expressed Congressional intent that grants of authority be broad in scope, and unencumbered by restrictions. See 49 U.S.C. 10922(h).

Consistent with Congressional intent, the Commission proposes to adopt a general policy statement to

provide guidelines for applicants seeking motor carrier and broker of property operating authority. The expressed policy of the Commission would be to authorize, whenever possible, broad grants of authority. Broad categories would be used in commodity and territorial descriptions. The Commission would also endeavor to grant broad operating authorities by eliminating the use of many restrictions commonly found in existing certificates and permits.

Statutory Powers

The Commission has statutory power to implement the provisions of the Act by adopting rules and regulations regarding issuance of permits and certificates. See 49 U.S.C. 10321. Moreover, 49 U.S.C. 11102 empowers the Commission to "classify and maintain requirements for certain carriers and brokers when required because of the special nature of the transportation provided by them." These powers are closely allied with the powers conferred by 49 U.S.C. 10922(e)(3) and 10923(d)(1) which allow the Commission to impose restrictions on grants of authority, and implies the power to remove such restrictions when they are no longer necessary. See *Regular Common Carrier Conference* v. *United States*, 307 F. Supp. 941 (D.D.C. 1969). The power of the Commission to promulgate regulations is broad in scope, and the Commission may use its entire discretionary power in devising such regulations. *American Trucking Ass'n* v. *United States*, No. 78-2260 (D.C. Cir. filed April 24, 1980).

The Commission exercised its powers to classify carriers in *Classification of Motor Carriers of Property*, 2 M.C.C. 703 (1937), and has since created additional carrier classifications and established various

requirements for different carrier classes. See *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 and 766 (1952) (defining the scope of certain generic commodity classifications), *Modification of Permits—Packing House Products*, 46 M.C.C. 23 (1945) (recognizing a class of carriers serving meat packing houses and establishing a generic commodity classification), and *Motor Common Carriers of Property—Routes and Services*, 88 M.C.C. 415 (1961) (classifying routes). Many instances requiring the Commission to interpret classifications and various requirements for these specialized carriers still arise. Recent examples include *Perkins Furniture Transport, Inc., Extension*, 128 M.C.C. 851 (1978), where it was decided that pianos and organs are embraced in the generic description, "new furniture," *Whiteford Transport, Inc., Van Conversion*, 131 M.C.C. 813 (1978), where it was decided that van conversions are passenger automobiles which may be transported by specialized automobile carriers, and *Interpretation of Aggregated Commodities*, 131 M.C.C. 779 (1979), where the types of aggregated commodities handled by heavy haulers were identified.

The power of the Commission to impose conditions on operating authorities, or remove conditions when they become unnecessary, has been exercised on many occasions. In *Fox-Smythe Transp. Co. Extension—Oklahoma*, 106 M.C.C. 1, 6 (1967), the Commission discussed extensively the imposition of restrictions on grants of operating authority under the present 49 U.S.C. 10922(e)(3), and the authority to require applicants to draft "proper and workable motor carriers applications and * * * to remove some of the confusion that now seems to exist in the area of restrictions and commodity descriptions generally." The courts

have upheld the Commission's power to impose restrictions on groups of authorities which have been previously issued, see *Thompson Van Lines* v. *United States*, 399 F. Supp. 1131 (D.D.C. 1975), as well as the power to remove certain restrictions, see *Regular Common Carrier Conference* v. *United States*, *supra*.

The proposed policy statement is an extension of these prior proceedings in light of the recent Congressional action.

Purpose of Our Proposal

Passage of the new motor carrier legislation requires development of more workable and acceptable forms of motor carrier authority. Three basic areas require attention: commodity descriptions, territorial descriptions, and miscellaneous restrictions. We will also address the standards for the "fitness related applications" of 49 U.S.C. 10922(b)(4), 10923(b)(5)(A), and 10924(b).

The impetus for this proposed change of policy is to foster more competition and greater operating flexibility in the motor carrier industry. We have recognized, as has the Congress, that a bewildering array of encumbered operating authorities has developed. Many of the motor carrier authorities now being issued have minutely described commodity descriptions, with vehicle, plantsite, and other restrictions attached.

The primary purpose of this practice has not been to assure complete service to the shipper, but rather to eliminate potential opposition. Carriers often amend their original applications to satisfy the demands of certain special interests.

The Motor Carrier Act favors additional competition and greater operating flexibility in the industry. It also expresses a policy that shippers' and receivers'

needs be met. Our proposed policy with regard to commodity descriptions, and the other descriptions discussed below, are consistent with the policies of the Act.

Acceptable Commodity Descriptions

From the inception of regulation of the motor carrier industry, commodity descriptions have presented the Commission with problems of interpretation and enforcement. Attempts have been made to develop a consistent methodology for describing commodities, and three principal formulas have been used: (1) Specific naming of a commodity, (2) reference to intended future use, and (3) generic or class-term commodity descriptions. See *C & H Transp. Co. Inc., Interpretation of Certificate*, 62 M.C.C. 586 (1954), *aff'd sub nom Arrow Trucking Co.* v. *United States*, 181 F. Supp. 775 (N.D. Okla. 1960). However, many descriptions in certificates dated back to original "grandfather" grants of authority, and were based on industry usage and outdated or inept choices of generic terms in certificates. See, e.g., *Eclipse Motor Lines, Inc., Interpretation of Certificate*, 52 M.C.C. 391, 392-93 (1951).

The Commission sought to deal with problems in the commodity descriptions in the *Descriptions* case, *supra*, by exploring the possibility of listing commodities transported by specialized motor carriers. The result was established of set commodity lists under class or generic headings, and defining certain standardized commodity descriptions for particular services.[1] The *Descriptions* case did succeed in defining

[1] The *Descriptions* case contained several appendices, listing commodities considered as falling under these generic headings: (a) Meats, packinghouse products, and commodi-

many classes of commodities, but did not succeed in solving the all interpretative and definitional problems regarding commodities. Attempts continued to establish additional classes of commodities[2] and numerous cases continued to issue interpretations of specific commodities.[3]

The Commission has always sought to act under the general policy of issuing grants of authority with broad commodity descriptions. *Fox-Smythe Transp., supra*, at 28. A primary concern of the Commission in framing grants of authority has always been to enable a carrier to render shippers and the public a complete transportation service. Broad grants of authority also take cognizance of technological modifications, changing industrial patterns and future needs. Moreover, broad commodity authorizations allow carriers to meet changing needs of shippers, receivers, and consumers, market demands, and the diverse requirements of the shipping public. See the National Transportation Policy, 49 U.S.C. 10101(a)(7)(A) and (B).

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ties used by packinghouses, (b) new furniture (uncrated), (c) kitchen equipment, (d) iron and steel articles, (e) building materials, (f) electrical appliances, equipment, and parts, (g) road construction machinery and equipment, (h) glass and glassware, (i) clothing and wearing apparel, and component parts used in the manufacture thereof, (j) paper and paper articles, (k) agricultural machinery, implements, and parts, (l) petroleum and petroleum products, in tank vehicles, (m) coal tar products, in tank vehicles, and (n) acids and chemicals, in tank vehicles.

[2] See *Mercer Extension—Oil Field Commodities*, 74 M.C.C. 459 (1946).

[3] See, e.g., *Definition of Cash Letters—Interpretation*, 131 M.C.C. 113 (1979).

Congress has mandated that the Commission "reasonably broadened the categories of commodities authorized by the carriers' certificate or permit," 49 U.S.C. 10922(h)(1)(B)(i). While this mandate applies to existing certificates and permits, we believe that it is the intent of Congress that all future grants of authority contain reasonably broad commodity descriptions.

To implement the intent of Congress, we propose that all future grants of motor carrier of property operating authority use broad industry groupings similar to the major industry groupings contained in the Standard Transportation Commodity Code (STCC). The STCC lists 37 industry groupings, with each heading referencing a listing of commodities considered to be part of that group. These listings are presently used by the railroads for tariff purposes. We propose to adapt and expand the codes for use by the motor carrier industry. A carrier authorized to transport a certain industry grouping would be entitled to transport all commodities included in that grouping.

However, several difficulties are presented by this proposal. The STCC is designed for use by the railroads, and as such it is adapted for their needs. We have reviewed the National Motor Freight Classification, but it does not appear to be as adaptable as the STCC codes because it uses commodity clarifications that may be too narrow. We acknowledge that the needs of the motor carrier industry differ, and if we are to use the STCC in drafting operating authorities, certain modifications may have to be made.

Several of the problems we envision with adoption of the STCC include:

(1) What commodities or classes of commodities, if any, are not included in the STCC listings? And what provisions should be made for newly developed commodities? An obvious solution to this problem—although perhaps not the best one—may be to require carriers to seek authority specifically to transport those commodities. Comments concerning this proposal should alert the Commission to such commodity omissions from the STCC.

(2) What effect would shifts in the commodity groupings by the designers of the STCC have on existing authority? Once a carrier is granted authority to transport the commodities contained in a STCC grouping, the Commission (or any other agency or body) may not revoke that authority. Deletions from the list would pose only theoretical problems, as such occurrences are rare or non-existent. Additions may not be made to authority without meeting the statutory requirements for additional authority.

We believe that this problem may be addressed in a manner similar to the solution of the problems raised by expanding commercial zones. Current interpretations involving expansions of commercial zones hold that such expansions cannot diminish the authority held by carrier. Thus, if a carrier is authorized to serve points in Illinois (except the Chicago, IL, commercial zone), expansion of that zone does not affect the territory the carrier is authorized to serve. Rather, reference is always made to the scope of the territory when the certificate or permit was granted. Therefore, we believe that a carrier might be authorized to transport one or more of the STCC groupings, which would remain constant regardless of any subsequent changes in the STCC listings. Any additions to the STCC listings would require a car-

rier to apply for modification of its certificate or permit, in compliance with the statutory requirements.

Alternatively, additions to the STCC code listings may be considered as adding to the scope of authority held by a motor carrier or property. Thus, if a new product not currently listed in a specific grouping is developed, and subsequently added to a grouping, any carrier authorized to transport that grouping would be authorized to transport the new product. Under this proposal, a commodity description would be similar to the currently used open-ended descriptions, such as chemicals, which enable a carrier to transport any product falling under that description, whether the product exists now or is developed in the future.

(3) Another possible issue raised by the proposal to adopt STCC-type listings would be the potential effect of Commission operating rights descriptions being governed by an outside authority. This might present a question of delegation of Commission authority to the STCC tariff agents. However, the Commission would adopt the commodity lists and retain jurisdiction over the lists and any changes in them. As the Commission would adopt the STCC listings by reference, we do not believe this would present a problem.

(4) The STCC groupings are not established by type of service, but rather by commodities only. In the past, the Commission has granted commodity descriptions in operating authority based upon type of service, e.g., commodities in bulk, or commodities requiring specialized equipment, or for service that is highly specialized, e.g., armored car service. The STCC groupings do not make provisions for such groupings. In addition, the Commission has developed broad commodity descriptions in special cases, such as oil field commodities as described in *Mercer*

Extension—Oil Field Commodities, supra, and the classifications in the *Descriptions* case, *supra. Comments* should address the desirability of retaining these descriptions, and the problems that may arise due to overlap with the proposed STCC-type descriptions.

(5) A commodity description now regularly used in certificates and permits is "materials, equipment, and supplies used in the (manufacture, sale, and distribution) of (named commodities)." None of the proposed commodity codes use this description. Comments should address the desirability of retaining this description.

(6) Last, several of the STCC groupings are not consistent with Commission jurisdiction or regulation. Therefore, modification of those groups would be required.

First, we note that some of the STCC codes involve exempt commodities as defined in 49 U.S.C. 10526(a)(6). Applicants would not be required to seek authority under those groupings, or to transport commodities exempt under the statute.

Second, the statute establishes a fitness-related application procedure for the transportation of "food and other edible products (including edible byproducts but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, and agricultural fertilizers" by owner-operators in common or contract carriage. See 49 U.S.C. 10922(b)(4)(E) and 10924(b)(5)(A). These sections of the statute do not totally exempt foodstuffs from economic regulation, and therefore we would retain the STCC code for food or kindred products. As some of the commodities included in this STCC groupings are exempt, we

would modify the classification to read "non-exempt food or kindred products." In other groupings that include both exempt and non-exempt commodities, the title would be modified to specify that only non-exempt commodities are being authorized.[4]

Next, there is no STCC listing for general commodities. The description general commodities includes all types of commodities, except those specifically excluded. *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co. Inc.*, 48 M.C.C. 189 (1948). The Commission has long recognized that carriers of general commodities belong to a specialized group, rendering a specialized service to shippers and receivers. Grants of general commodities authority have consistently excepted certain commodities.[5] See *Comet Messenger & Deliv. Serv., Inc., Com. Car. Applic.*, 111 M.C.C. 13, 18 (1970), and *Watkins Motor Lines, Ext.—General Commodities*, 113 M.C.C. 658, 670 (1971).

To continue the type of transportation provided by general commodities carriers, we propose to establish a new STCC-type grouping for commodity description purposes, to be designated group 51, general commodities (except household goods as defined by the Commission, and classes A and B explosives).

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[4] Applicants will not be required to seek authority to transport mixed loads of exempt and non-exempt commodities. See 49 U.S.C. 10526(a)(6) and 10528.

[5] Commodities in bulk, those requiring special equipment commodities of unusual value, classes A and B explosives, and household goods as defined by the Commission, are usually excluded from general commodity grants of authority. These five categories have been consistently recognized to involve specialized services not normally transported by general commodities carriers. See 49 U.S.C. 10526(a)(6) and 10528.

We believe that the only purpose to be served by retaining exceptions for commodities in bulk, commodities requiring the use of special equipment, and commodities of unusual value, would be to protect the specialized carriers denoted by the exceptions. Such a purely protectionist attitude appears to be contrary to the intent of Congress that the Commission issue grants of authority with broad commodity descriptions, see 49 U.S.C. 10922(h)(1)(B)(i), and that the Commission encourage competition among motor carriers of property, see 49 U.S.C. 10101(a)(7). We would retain the exceptions for household goods as defined by the Commission, in light of the pending legislation regarding that segment of the transportation industry, and classes A and B explosives, in light of the safety considerations. However, this would not preclude an applicant from specifically seeking authority to transport those commodities.

Finally, adjustments to the STCC code must be made to adapt them to Commission jurisdiction. STCC groups 35 (Machinery, except electrical) and 36 (Electrical Machinery or Equipment, and Supplies) would be combined into one group, renumbered STCC group 35—Machinery and Supplies. This is for administrative convenience.

STCC groups 44, 45, and 46 (Mail and Express Traffic, are not involved in transportation by motor carriers of property, and will be excluded. STCC group 47 (Small Packaged Freight Shipments) is described statutorily in terms of 100 pound shipments, see 49 U.S.C. 10922(b)(3)(D). This category is discussed below.

We foresee the possibility of problems in interpreting several of the STCC categories, e.g. STCC group 39 (Miscellaneous Products of Manufactur-

ing), and STCC group 41 (Miscellaneous Freight Shipments). The commodities contained under these groupings are general miscellaneous commodities not contained in any other grouping. We see as one possibility abolishing these groupings, and subsuming the involved commodities in the general commodities category.

A revised listing of the STCC major industry groupings, modified as discussed above, is attached as Appendix A.

Despite the difficulties that may exist in adapting the STCC scheme to the motor carrier industry's operating authorities, we believe that investigation of the possibility is warranted. No system of commodity classification is going to be perfect. On the other hand, if we are able to use this or another classification system which defines and classifies commodities into readily distinguishable categories, everyone will benefit. Computerization of billing may be advanced. The Commission itself may be able to benefit from computer technology, and keep better track of operating authorities. Moreover, less effort will be required to interpret the lawful scope of an operating authority.

Acceptable Territorial Descriptions

Descriptions of territorial authority sought in operating rights applications have presented the Commission with interpretative and enforcement problems since the beginning of motor carrier regulations. Many proceedings have been instituted to clarify the scope of territorial descriptions. See, e.g., *Classification of Motor Carriers of Property*, 2 M.C.C. 703 (1937), *Transportation Activities, Brady Transfer & Storage Co.*, 47 M.C.C. 23 (1947), and *Motor Com-*

mon Carriers of Property—Routes and Services, 88 M.C.C. 415 (1961). The Motor Carrier Act of 1980 introduces new considerations into the Commission's issuance of routes and territorial descriptions. The Commission is now specifically mandated to consider fuel efficiency, productive use of equipment, service to small communities and small shippers, and changing market demands. 49 U.S.C. 10101(a)(7). Moreover, the Act states that the Commission must eliminate from existing certificates gateway restrictions and circuitous route limitations, unreasonable or excessively narrow territorial limitations, and any other territorial restrictions deemed to be wasteful of fuel, inefficient, or contrary to the public interest. 49 U.S.C. 10922(h)(1)(A), (B)(iv) and (v). The Commission is further directed to authorize intermediate point service where it was previously prohibited in regular-route service, and to provide round-trip authority where only one way authority exists. 49 U.S.C. 10922(h)(1)(B)(ii) and (iii). While these sections apply to existing certificates and permits, we believe that it is the clear intent of Congress that all future motor carrier and broker of property grants of authority contain reasonably broad territorial descriptions consonant with these sections.

Common Carriage: In the case of irregular-route authority, only two-way authority would be acceptable. Thus, the one-way radial description, "from * * * to", would no longer be used. Applicants could continue to seek either two-way radial authority ("between * * *, on the one hand, and, on the other, * * *") or non-radial authority ("between points in * * *"), as appropriate. If a carrier wants to transport a different commodity on its backhaul, it would apply for separate authority for that commodity.

Applicants have been permitted to describe origin or destination points specifically, indicating a named city or plantsite. All applications in the future would employ only county-wide descriptions (or the functional equivalent)[6] for the territory wished to be served. We believe this description is consistent with the intent of the Act.[7] The Commission has been expanding base territories beyond named cities, see 49 C.F.R. 1048.101-1048.102. Use of county-wide base or destination territories is consistent with the commercial zone theories long a part of Commission territorial descriptions.

County units are a reasonable choice as a minimum size unit. There are well defined territories. Most counties have related economic concerns. The county governmental unit and taxing power provide a strong economic bond. The typical county unit is sizeable enough so that undue fragmentation in operating authority would be avoided, yet it is small enough so that its business and inhabitants will share many of the same service needs.

Authorization of service involving points in the United States has routinely omitted points in Alaska

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[6] We are aware that not all States use counties as jurisdictional divisions, and therefore county-wide descriptions will not be appropriate in all cases. For example, Louisiana uses the parish as its local jurisdictional unit, and Virginia has many independent cities not included in a county. Additionally, we are aware that some cities encompass more than one county, e.g. New York, N.Y., is comprised of five separate counties. We would appreciate comments concerning similar situations that may require departure from the use of county-wide descriptions.

[7] See Congressional Record, vol. 126, No. 101-Part II, June 19, 1980, p. H5410, colloquy between Messrs. Schuster and Howard.

and Hawaii. The Commission has often stated that specific authority is required for service to those two States. See *American International Driveway Ext.—Hawaii*, 117 M.C.C. 63, 67 (1972), and *United Van Lines, Inc., Extension—Alaska*, 99 M.C.C. 331 (1965). To promote the most competitive and efficient transportation system, meeting the goals of the National Transportation Policy, an applicant for operating authority will no longer have to specify Alaska and Hawaii in requests to operate in points in the United States.[8]

Regular Routes: The territorial distinction between irregular- and regular-route authority would be retained for the present. 49 U.S.C. 10922(d)(1)(B) and (C). However, modifications in the accepted regular-route descriptions would be implemented. Consonant with expressed Congressional intent, carriers would be required to seek two-way authority on their regular routes. This would eliminate the "from * * * to * * *" description, without return operations over the specified routes, and will also eliminate so-called "circular routes" which required the carrier to conduct only one-way operations.

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[8] 49 CFR 1041.11. Service to, from, and between points in each Alaska and Hawaii, interprets certificates and permits issued prior to admission of Alaska and Hawaii as States in 1959 and is not affected by this policy statement. Similarly, 49 CFR Part 1050, Motor Carrier Operations in the State of Hawaii, deals with an exemption for operations solely within the State of Hawaii, and is not affected by our actions here. The provisions of the Act encourage intermodal service, see 49 U.S.C. 10101(a)(7)(H), and we do not believe the revision of the statute will affect the provisions of 49 CFR Part 1091, Practices of For-Hire Motor Common Carriers of Property Participating in Alaskan Motor-Ocean Motor (AMOM) Substituted Service.

In seeking regular-route authority, applicants would not be allowed to use intermediate-point restrictions. Regular-route service would be conducted between two named points, with service authorized to all intermediate points. Off-route point authority would continue to be an acceptable form of application for regular-route authority.

Contract Carriage: The Act modifies the requirements for contract carriage by amending 49 U.S.C. 10923, adding that the Commission may not require a contract carrier of property to limit its operations to carriage for a particular industry or within a particular geographic area. We believe that it was the intent of Congress to give property contract carriers wide latitude in providing service to the contracting shippers. Therefore, we would not require an applicant for contract carrier of property authority to specify the territory in which it will serve the contracting shippers. A proper application for this contract carrier authority would include the class of commodities to be transported, and the name of the supporting contracting shipper. The territorial scope of operations in all permits will be stated as "between points in the United States." [9]

Unacceptable Restrictions

The imposing of restrictions, whether to protect competing carriers from competition, or to define more clearly the authority granted based on the evidence of need for the proposed service, has been a

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[9] Therefore, a contract carrier caption summary will read, "To transport XYZ commodities between points in the United States, under continuing contracts with (the ABC Co. of Anytown, USA)."

part of the Commission's licensing operations since 1935. Many types of restrictions have been imposed, with the result that "* * * the existing regulatory system governing the interstate motor carrier industry contains numerous and unnecessary restrictions on the actual operations of the motor vehicle and the service that can be provided to the public." Senate Report, at 7. To remedy this situation, Congress has mandated that the Commission implement regulations to allow carriers to remove from their certificates unreasonable restrictions that are wasteful of fuel, inefficient, or contrary to the public interest, 49 U.S.C. 10922(h)(1)(B)(v).

The Commission believes that it is the intent of Congress to prevent the imposition of such restrictions in the future so that operating authority granted subsequent to the passage of the Act will not be encumbered by unreasonable restrictions. To that end, the Commission would no longer impose many of the restrictions now found in certificates.

The Commission holds a wide range of discretionary authority in determining where, on balance, the public interest requires that a restriction should be imposed. Cf. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60 (1945). Restrictions that are inconsistent with the public interest and inimical to practicable and effective regulations have long been rejected by the Commission. See, e.g., *J. E. Bejin Cartage Co. Contract Carrier Application*, 53 M.C.C. 255 (1951). Moreover, the Commission has refused to impose restrictions that create undesirable complications, unless it has been shown that they are overwhelmingly necessary in the public interest and consistent with practicable and efficient transportation regulations. See *Fox-Smythe Transp., supra*, at

9. The history of regulation of the motor carrier industry reveals that the Commission has, at times, looked favorably on the imposition of certain restrictions. However, the current state of the industry, as recognized by Congress in the Act, warrants reexamination of Commission policy concerning restrictions.

Facilities and Interlining Restrictions: These territorial restrictions are commonly found in grants of operating authority. Facilities restrictions have been, for the most part, included in a grant of authority where the exact locations of a particular plant is not otherwise identifiable, or to protect the interests of existing carriers where necessary and desirable. The restriction has been imposed in instances where the resulting scope of authority would exceed the limited proof of need for service shown by a single shipper, see *Kreider Truck Service, Inc., Extension—Lard Oils*, 82 M.C.C. 565 (1960), and therefore, to protect existing carriers from additional competition. See also *Fox-Smythe Transp., supra*, at 51.

"Originating at or destined to" restrictions have been imposed on a showing by protestants or frequently, on concession by applicant) that failure to impose such a restriction would materially and adversely affect the protestant. Moreover, restrictions against interlining and tacking have been imposed where these operations would result in additional competitive operations which would materially and adversely affect the operations of other authorized carriers. *Riss & Co., Inc., Ext.—Dakota County, Nebr.*, 102 M.C.C. 336, 343 (1966). These considerations have often outweighed the stated Commission preference not to encumber grants of authority and to encourage interlining and interchange between car-

riers. See *Tompkins Motor Lines, Inc., Extension—Louisville*, 95 M.C.C. 472, 481 (1964).

Congress has outlined specific considerations the Commission must take into account in framing operating authority. These include more productive use of equipment and energy resources, the promotion and maintenance and service to small communities, the promotion of intermodal service, the elimination of unreasonable or narrow territorial limitations, and the general policy that authority not be encumbered by restrictions. See 49 U.S.C. 10101(a)(7) and 10922(h). These considerations militate against the continued use of facilities and interlining restrictions.

The Commission has long held that a grant of operating authority may be based on support of one shipper, and that evidence presented by one shipper would be considered representative of the need for service in the community generally.[10] Consequently, the need for service may be adduced by one shipper, without limiting service to that one shipper. Therefore, when an applicant presents support for its operating proposal, one shipper's evidence can be considered sufficient to warrant a broad grant of authority.[11]

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[10] Compare *Shrader Common Carrier Application*, 71 M.C.C. 364 (1957), *Southern Exp. Inc., Common Carrier Application*, 62 M.C.C. 35 (1953), and *Stockberger Common Carrier Application*, 46 M.C.C. 599 (1946).

[11] A public need can be demonstrated by the supporting statement(s) of a shipper, of another person or persons, or of the applicant itself. See Report of the House Committee on Public Works and Transportation on H.R. 6418, as amended, June 3, 1980, p. 14; and *Congressional Record*, vol. 126, No. 102, June 20, 1980, pp. S7684-5, colloquy between Senators Packwood and Cannon.

Tacking Restrictions: [12] The Commission proposes to continue the policy of prohibiting the tacking of irregular-route authority with a carrier's existing irregular-route certificates. Carriers are now allowed to tack irregular-route authority with existing irregular-route certificates only if notice of the intent to tack is published in the *Federal Register* and the evidence establishes a need for that type of service. We propose to prohibit carriers from requesting authority to tack irregular-route certificates under any circumstances, as the proper mechanism for providing service is to consolidate existing certificates and provide direct service without observing gateways. We believe this approach would be consistent with the mandate of 49 U.S.C. 10922(h)(1)(A), requiring the Commission to eliminate gateways and circuitous route limitations. This proposed approach would preclude the creation of any new gateways.

Equipment Restrictions: The imposition of equipment restrictions has been based on evidence adduced in an adjudication, but, more frequently, by consent of parties without an affirmative showing of any necessity for them. In both situations, the effect has been to protect existing carriers from additional competition. The Commission has long believed that restrictions are inherently undesirable and should not be imposed or retained except where it is shown conclusively that they are necessary in the public interest and consistent with effective transportation regulation. See *Fox-Smythe Transp., supra*, at 9.

Equipment restrictions involve a wide range of transportation services. Common equipment restric-

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[12] The subject of elimination of gateways and circuitous route limitations will be dealt with in a separate proceeding.

tions include mechanical refrigeration,[13] tank vehicles, hopper vehicles, dump vehicles, and van-type equipment.

Restrictions prevent carriers from rendering to the public a fully efficient and economical service. The Commission has long recognized that the use of equipment to its fullest capacity is economically sound, and has encouraged improvement of transportation methods. See *Removal of Truckload Lot Restrictions, supra.* The Commission has refused to impose restrictions for or against transportation involving certain types of equipment where the result would be to prevent rendition of a service with optimum efficiency. *Stearns Common Carrier Application,* 96 M.C.C. 627 (1964). The elimination of equipment restrictions from future grants of authority should enable carriers to provide shippers and the public with a more complete, economical, and efficient service.

Commodity Restrictions. Common among the commodity restrictions imposed by the Commission are restrictions against transportation in bulk, in bags, in containers, and mixed loads. These restrictions concern the transportation of types of commodities. The adoption of the STCC-type commodity codes for industry groupings would, in effect, preclude the use of these types of restrictions. Carriers would be required to use only broad commodity groupings. We propose to reject all motor carrier applications not using approved broad commodity descriptions.

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[13] The Commission is currently considering adoption of a rule which would delete from all existing certificates and permits restrictions limiting transportation service to that provided in "vehicles equipped with mechanical refrigeration." Ex Parte No. MC-139, *Removal of Mechanical Refrigeration Restrictions,* 45 FR 25419 (1980).

Restrictive Amendments. In recent years, the tendency has developed among parties to operating rights proceedings to propose restrictive amendments to eliminate a party's opposition to an application. These amendments have been closely scrutinized when it appears that they subordinate the public need for a particular service to the applicant's own interest, leaving a muddled picture of the authority sought and confusing support for the amended proposal. *Fox-Smythe Transp., supra.* at 21. The Commission has had the policy of rejecting restrictive amendments that unduly fragment authority, and thus prevent shippers and receivers from obtaining service they require. See *Sykes Transport Co. Common Carrier Application*, 83 M.C.C. 113 (1960).

The Motor Carrier Act emphasizes the principles of the *Sykes* case. Applicants should be required to seek broad authority, and not restrict the authority against providing service to certain points, or against transporting certain commodities. Restrictive amendments tend to fragment authority at all times, and not only when designed to eliminate opposition to an application. Therefore, in a separate proceeding, we propose not to accept restrictive amendments in the future. See Ex Parte No. 55 (Sub-No. 43), *Rules Governing Applications for Operating Authority*, published elsewhere in this issue.

Fitness Related Applications

The Act provides six exceptions from the licensing provisions generally applicable to applicants for certificates and permits. An applicant for authority under one of these provisions of the act must show only that it is within the exception, and that it is fit to conduct the operations.

We propose that the descriptions used in the "fitness related applications" be treated separately and not use the description policy for certificates and permits previously discussed. The transportation services enumerated by Congress in 49 U.S.C. 10922(b)(4), 10923(b)(5)(A), and 10924(b) require only that the Commission find the applicants for such authority to be fit, willing, and able properly to perform the operations. Congress has described in the statute the type of service, and we would use the statutory language for the commodity descriptions.

(1) *Transportation to any community not regularly served by a motor carrier of property* (49 U.S.C. 10922(b)(4)(A)). An applicant for authority under this exception must show that the community it wishes to serve does not receive a particular type of service. An applicant must then indicate under which commodity grouping or groupings it wishes to perform the new service in its caption summary submitted with the application. The proper territorial designation for service *to that community* will be two-way radial authority between the involved community, on the one hand, and, on the other, points in the United States.

(2) *Transportation service as a direct substitute for complete abandonment for rail service* (49 U.S.C. 10922(b)(4)(B)). An applicant for authority under this exception must file its application within 120 days after the abandonment of rail service has been approved by the Commission. The abandonment of railroad service to community must leave the community without any rail service. Rail service generally provides transportation of a vast range of commodities. Therefore, *general commodities* will be the appropriate commodity description. The appro-

priate territorial description would be between the point(s) of abandoned service on the railway on the one hand, and, on the other, points in the United States.

(3) *Transportation for the United States Government of certain commodities* (49 U.S.C. 10922(b)(4)(C). An applicant for authority under this exception would be able to apply to transport *general commodities* (except household goods as defined by the Commission, hazardous or secret materials, and sensitive weapons and munitions). The territorial scope of the authority under this section would be between points in the United States.

(4) *Transportation of shipments weighing 100 pounds or less if transported in a motor vehicle in which no one package exceeds 100 pounds* (49 U.S.C. 10922(b)(4)(D)[14] Applicants for this authority would be permitted to transport *shipments weighing 100 pounds or less.* The proper territorial authority for applications under this authority would be between points in the United States.

(5) *Motor Carrier brokers of property* (49 U.S.C. 10924(b)). Applicants for property broker authority would be permitted to arrange for the transportation of general commodities (except household goods),[15] between points in the United States.

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[14] Applicants under this exception are subject to the provision that notwithstanding any other provision of Title 49, any carrier holding authority under this subparagraph operating one or more commercial vehicles with a gross weight rating of 10,000 pounds or more shall be subject to Department of Transportation safety regulations for all of its fleet of vehicles.

[15] See 49 U.S.C. 10924(a).

(6) *Transportation by common carriage of food and other edible products (including edible byproducts but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, and agricultural fertilizers* (49 U.S.C. 10922(b)(4)(E). Transportation under this category must be provided by an owner-operator in his or her own vehicle (except in emergencies), and can only be provided to transport a total tonnage equal to the amount the owner-operator transports of exempt commodities under 49 U.S.C. 10526(a)(6). The certificate would be issued to read, "To transport *food and other edible products (including edible byproducts but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, and agricultural fertilizers*, by the owner of the motor vehicle in such vehicle, between points in the United States."

(7) *Transportation by contract carriage of food and other edible products (including edible byproducts but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, and agricultural fertilizers*, (49 U.S.C. 10923(6)(5)(A). A permit issued under this exception would enable an owner-operator to transport in his or her own vehicle (except in emergency situations) "*food and other edible products (including edible byproducts but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, and agricultural fertilizers* by the owner of the motor vehicle in such vehicle, between points in the United States, under a continuing contract or contracts with (XYZ Company of Anytown, USA)." No particular geographical area may be

specified, see (49 U.S.C. 10923(d)(1). As in the case of common carriage, discussed above, at least 50 percent of the transportation provided by the motor vehicle (measured by tonnage) must involve exempt commodities under 49 U.S.C. 10526(a)(6).

Environmental and Energy Considerations

We do not foresee that the proposed policy statement will significantly affect the quality of the human environment. The proposed policy statement is being issued consistent with the Motor Carrier Act of 1980, in which Congress has determined that the actions here proposed are in the interests of energy efficiency and conservation.

This notice of proposed policy statement is issued pursuant to 49 U.S.C. 1032, 10922, and 10923, and 5 U.S.C. 553.

Decided: June 26, 1980.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, Alexis, and Gilliam.

Agatha L. Mergenovich,
Secretary.

Revised STCC Major Industry Groupings

01 Non-exempt Farm Products
08 Forest Products
10 Metallic Ores
11 Coal
13 Crude Petroleum, Natural Gas or Gasoline
14 Nonmetallic Minerals; except Fuels
19 Ordnance or Accessories
20 Non-exempt Food or Kindred Products

21 Tobacco Products; except insecticides—see major Industry Group 28
22 Textile Mill Products
23 Apparel, or Other Finished Textile Products or Knit Apparel
24 Lumber or Wood Products; except Furniture—See Major Industry Group 25
25 Furniture or Fixtures
26 Pulp, Paper, or Allied Products
27 Printed Matter
28 Chemicals or Allied Products
29 Petroleum or Coal Products
30 Rubber or Miscellaneous Plastics Products
31 Leather or Leather Products
32 Clay, Concrete, Glass or Stone Products
33 Primary Metal Products; inc. galvanized; except coating or other allied processing—see Major Industry Group 34
34 Fabricated Metal Products; except Ordnance—see Major Industry Groups 19—Machinery, 35, or 37—Transportation Equipment
35 Machinery and Supplies
37 Transportation Equipment
38 Instruments, Photographic Goods or Optical Goods, Watches or Clocks
40 Waste or Scrap Materials Not Identified by Industry Producing
42 Containers, Carriers, or Devices, Shipping, Returned Empty
49 Hazardous Materials
51 General Commodities (except household goods as defined by the Commission and classes A and B explosives)

[FR Doc. 80-19941 Filed 7-2-80; 8:45 am]

BILLING CODE 7035-01-M

OPERATING RIGHTS APPLICATION PROCEDURES

*If ALJ OPPOSITION IS FILED, THE TENTATIVE GRANT PUBLISHED IN THE FEDERAL REGISTER IS MADE EFFECTIVE

[FR Doc. 80-40012 Filed 12-30-80; 8:45 am]
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INTERSTATE COMMERCE COMMISSION

[Ex Parte No. 55 (Sub-No. 43A)]

Acceptable Forms of Requests for Operating Authority (Motor Carriers and Brokers of Property)

AGENCY: Interstate Commerce Commission.

ACTION: Policy statement.

SUMMARY: The Commission issues this policy statement to guide carriers in requesting authority under the Motor Carrier Act of 1980. Carriers are now to apply for broad, unencumbered authority. Commodities shall be stated in terms of generic groups. Territories are to be countywide or larger for irregular-route carriers and between points in the United States for contract and most fitness-only carriers. Two-way routes with no intermediate point restrictions are to be applied for by regular-route carriers. Restrictions will be allowed only in highly unusual cases.

EFFECTIVE DATE: This policy statement applies to all applications for motor carrier and broker of property authority filed after December 31, 1980.

FOR FURTHER INFORMATION:

Ombudsman's Office, 202-275-7440;
David B. Gaynor, 202-275-7904;
Edward E. Guthrie, 202-275-7691.

FOR COPIES OF THIS DECISION: The *Federal Register* publication does not contain Appendix B, which is a summary of the public comments received.

The Commission will publish the entire decision, copies of which may be obtained by calling 202-275-7307 or 800-424-5230.

SUPPLEMENTARY INFORMATION: The Motor Carrier Act of 1980 (the Act) establishes as Federal Policy the promotion of competition and efficiency among carriers and brokers of property. See 49 U.S.C. 10101(a)(7). The overall purpose of the Act is to reduce unnecessary regulation by the Federal Government. See Section 2 of the Act. We are to implement these policies in the entry area by granting broad authorities to future applicants and by removing unnecessary burdens on those now operating. This policy statement is designed to accomplish the goal of awarding broad authorities to future applicants. The removal of existing burdens will be accomplished in final rules to be adopted in Ex Parte No. MC-142 (Sub-No. 1), *Removal of Restrictions, Motor Car. of Property*, 132 M.C.C. 114 (1980), and Ex Parte No. MC-142, *Elimination of Gateway Restrictions*, 132 M.C.C. 174 (1980).

Broad authorities are necessary to effectuate the National Transportation Policy, as amended by Section 4 of the Act [49 U.S.C. 10101(a)(7)], which directs us:

> with respect to transportation of property by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and

well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers; (F) improve and maintain a sound, safe, and competitive privately-owned motor carrier system; (G) promote greater participation by minorities in the motor carrier system; and (H) promote intermodal transportation.

Three principal considerations underlie our view. First, hightly restricted authority narrows the range of operational options available to carriers and prevents them from making optimally efficient use of their equipment. It compromises overall efficiency and necessarily increases fuel use. At the same time, it prevents carriers from offering service designed to meet the full extent of a shipper's needs or responding promptly to changing market demands.

Second, restricted authority compromises the ordinary competitive activity of motor carriers and blunts the opportunity of carriers to attack markets that may be inadequately served. Since the time required for processing entry applications often exceeds the time needed for carriers to adjust their business operations, narrowly drawn authority serves as a genuine barrier to allowing a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public. The grant of broader authority will, at the same time, create a larger class of potential entrants and thus place increasing pressure on incumbent operators to offer responsive service.

Third, narrowly drawn authority contributes to the unnecessary economic costs associated with regulatory processing by injecting the Commission into the

regulatory arena even in circumstances in which no public purpose is served by our involvement. The facts that 60 to 70 percent of the applications for permanent authority are unopposed, and that upwards of 95 percent of the applications are granted, strongly suggest that the Commission becomes involved more often than necessary. While the continuation of the licensing process requires that we scrutinize requests for entry into the industry or expansion of existing carriers into new markets, direct regulatory intervention should occur only when the operation of market forces would be inadequate to achieve the performance goals which the National Transportation Policy largely assumes will result from competition. While the creation of broader commodity and geographic descriptions is only one tool, we believe it will go a long way toward reducing unnecessary regulation by the Federal Government in furtherance of the Congressional mandate.

Specific provisions of the Act reinforce our view. Under Section 6 of the Act ["Removal of Certain Restrictions on Motor Carrier Operators," 49 U.S.C. 10922(h)], we must eliminate gateway and other unnecessary restrictions, circuitous route limitations, and unreasonably limited commodity and territorial authorities. Logic dictates that, if we take these actions for carriers with existing authorities, we must also assure that future authorities are not subject to the same defects the Congress perceived in our past practices. It is obvious that competition and efficiency on the scale envisioned by the Congress cannot be achieved if we broaden existing authorities, while continuing to grant narrow authorities. We would thereby create a class of competitively disadvantaged carriers (at least initially), which would be

entirely inconsistent with the purposes of the Act. These considerations support our inference that we must grant broad, unencumbered authority to future applicants.

Furthermore, we do not believe that Congress intended that contract carrier authority be limited with respect to territories or industries. See 49 U.S.C. 10923(d)(1). We are also to grant authorities to certain carriers upon only a showing of fitness. See 49 U.S.C. 10922(b)(4) and (9), 10923(b)(5)(A), and 10924(b). Finally, since motor carrier dual operations are no longer of significance, we also cannot prohibit authority because of carriers' dual capacities. Thus, many actions we take here are not really matters over which we may exercise discretion, but rather are mandated explicitly by the Act.

In our notice proposing this policy statement, we indicated we would implement this new policy by directing future applicants to follow certain guidelines in casting their requests for authority. Briefly, these call for descriptions of commodities in terms of groups based on the Standard Transportation Commodity Code (STCC, and routes or territories in broad terms. As a general rule, no restrictions would be allowed except in highly unusual instances.

The comments largely support our proposed policy. Most believe, as we do, that Congress intended significant changes in the way we issue authorities. However, others disagree both with this statement and with our fundamental view of the extent of the Act.

Overall, these comments lead us to confirm our proposals. We shall now grant authorities in terms of generic groups, which describe territories and routes on a reasonably broad basis, and with virtually no restrictions.

The major change from our original proposal is our decision not to prescribe the exact form of commodity descriptions. Instead, we shall leave to each applicant the selection of a broad description that it believes will best meet its business requirements. Since we are required to eliminate unreasonably narrow descriptions, we expect applicants to employ commodity descriptions which are at least as broad as the standard industry groupings we earlier proposed. Our Employee Boards will screen applications to ensure that broad commodity descriptions are being used. But the choice over the scope of the broad commodity description is in the hands of the applicant. Carriers are to be able to perform as complete a service as possible for shippers, with competition—not narrowly limited authority—defining the boundaries of service.

Preliminary Matter

There are a number of requests for oral hearings in this proceeding. We have received extensive and cogent representations in this matter and find no need for oral argument. In addition, we are dealing with guidelines, not binding rules. When a party sufficiently justifies a need for a variation from a guideline, we are free to consider and adopt that position in that application. Unusual items not covered are those best addressed in individual applications.

Jurisdictional Matters

This Commission is empowered to issue appropriate authority to persons wishing to conduct operations pursuant to the provisions of the Act. See 49 U.S.C. 10922, 10923, and 10924. This implies the ability to determine how grants of authority are to be framed. See 49 U.S.C. 11102. Our duty is to ensure that they are broad and unencumbered to promote competition and efficiency.

Attacks on our proposal are made on five principal grounds:

(1) The Act gives us the ability to eliminate only clearly unnecessary language in existing authorities.

(2) Grants based on the proposed descriptions would usually go beyond the public need shown.

(3) Extremely broad grants are tantamount to master licensing.

(4) Extremely broad grants carry with them duties wider than the recipients can realistically meet under their common carrier obligation.

(5) The terms of the policy statement are so direct that the statement is actually a rulemaking and must be conducted as such.

Finally, we are asked to state whether this proceeding applies to passenger applications. We shall address each of these matters in turn.

A. *Ability Limited To Changing Terms of Existing Grants.*

Section 6 of the Act only addresses removal of constricting terms in existing authorities. Some commentors thus argue that, as a matter of law, we have no ability to change the type of terminology to be used in future grants of authority. We disagree. This argument assumes that in the past we followed a conscious policy of issuing only picayune grants. Our policy, however, has been to issue authority as broad as warranted by the circumstances. It is true that there are (unfortunately, in our mind) numerous instances of limited authorities. This resulted largely from applicants who narrowly framed their initial requests for authority and subsequently restricted to avoid litigation expenses and delays. These authori-

ties do not exemplify our policy, but reflect instead, a recognition by applicants that, during an earlier regulatory period when the prosecution of applications was time-consuming and expensive, it was more prudent to accommodate the interest of one's competitor rather than litigate the full scope of the needed authority. While we were not unsympathetic to these motives in the past, their legitimacy has been substantially undermined by the procompetitive substance of the Motor Carrier Act of 1980 and the changes we are making in the procedural infrastructure of the licensing process.

In any event, Section 6 implicity confirms that new authorities be framed in broad terms. Surely, Congress would not have directed us to broaden existing authorities unless it intended that future grants would be of equal latitude. The inference is clear that Congress sought to achieve a parity in the scope of the operating rights of existing carriers and new entrants.

Equally important, we are not prescribing limited lists of acceptable commodity or geographical descriptions. We are, instead, establishing guidelines for acceptable minima. In the commodity area in particular, we are prepared to entertain applications using commodity descriptions different from those proposed in our original notice as long as they are not unreasonably narrow. We appreciate that Congress did not specifically direct us to standardize commodity descriptions, and we shall not do so. We will accept reasonably broad commodity descriptions in the future, even if they are not the group used in STCC.

B. *Grants Beyond the Public Need Shown.*

We go beyond public need, according to opponents, because we will necessarily authorize more commodity and territorial authority than is warranted by the evidence. Carriers seeking authority must show that their proposals would serve a useful public purpose, responsive to a public demand or need. Therefore, in the opponents' view, we must examine each application minutely and grant only to the actual extent of support given.

We believe this view contains hypotheses which too narrowly interpret the evidentiary bases on which we may grant authorities. The Act does not limit us merely to considering and granting authorities based on shipper support or presently moving traffic. Just as in the past, we may consider other evidence, such as traffic studies or anticipated future movements. And we are to consider all evidence in light of a number of factors, most notably those in the National Transportation Policy [49 U.S.C. 10101(a)(7)]. Therefore, we must weigh in each application, when applicable, "a need or demand for new services, innovative quality or price options, increased competition, greater fuel efficiency, improved service for small communities, improved opportunities for minorities, and any other benefits that would serve a useful public purpose." H. Rept. No. 96-1069, p. 15. Shipper support is only part of a schematic representation which can evince a public purpose sufficient to justify a grant of new authority. Other evidence can and will be considered, and grants broader than existing shipper needs can and will be made.

It is well established that the Commission can grant authority based on representative evidence. Thus, a grant of Statewide authority has never needed sup-

port from all, or even most, municipalities in the State. All that has been required is a representative number. Similarly, broad commodity descriptions have been granted based on evidence of a representative showing of commodities falling within that broad description. Our proposal, therefore, does not represent any significant departure from prior decisional norms in many cases.

C. *Grants Tantamount to Master Licensing.*

The argument that we are engaging in master licensing is without merit. The sections prohibiting master licensing, 49 U.S.C. 10922(b)(3) and 10923(b)(6), state that we may not make findings of public need based upon general findings developed in rulemaking proceedings. Since we shall be making findings of a need for service in each application in accord with the procedures and standards affirmatively stated in the Motor Carrier Act of 1980, no master licensing is involved.

D. *The Common Carrier Obligation.*

We do not believe that the common carrier obligation present a problem. We frankly admit that the traditional view of the common carrier obligation is in some respects in conflict with our expression here. On the other hand, we do not believe the Congress would have charted this course for us if the traditional view dictated an absolute and inflexible approach to the issue. We shall be examining this question in a separate proceeding where our views will be set out more fully.

E. *Policy Statement as Opposed to a Rulemaking.*

This policy statement need not be renoticed as a rulemaking or dismissed entirely, as some commen-

tors suggest. The opponents to our proposal [citing such decisions to *American Bus Association* v. *United States*, 627 R.2d 525 (D.C. Cir. 1980)] are in essence arguing that this policy statement leaves no room for discretion in its application.

We note, as a threshold matter, that the court's concerns in the *American Bus Association* case involved our failure to offer interested persons an opportunity for comment before implementing our proposal. In the instant case, we gave full notice of our proposal in the *Federal Register*, received comments from interested persons, and have modified our proposal in light of those comments. Consequently, even if our proposal was to be considered a rule instead of a policy statement, we have fully complied with the procedural requirements of 5 U.S.C. 553. Moreover, the court in *American Bus Association* was concerned with the retrospective application of policy statement under review. Our instant proposal is prospective in nature only, and therefore not subject this concern expressed by the court.

In any event, what we propose is not mandatory. If an applicant justifies the use of another reasonably broad description of the authority needed, we will allow that description to be used.

For the reasons stated above, we will also not void authority granted since July 1, as requested. Based upon the evidence presented when reviewed under the new statute, the grants have been properly made.

F. *Passenger Applications.*

This notice applies only to the transportation of property. To extend it to regular-route passenger applications would be unwarranted for several reasons, not the least of which is that the new Act does

not appreciably apply to passenger carriers. Legislation in this area is in its formative stages. We can make corresponding changes, if warranted, after it is adopted.

Acceptable Commodity Descriptions

Many of the commodity descriptions we have authorized in the past have given carriers less authority than they needed to perform a complete service for the public. Authorizations of less than the total public need can no longer be tolerated. Only when carriers can provide complete service to an industry, area, or other cognizable part of the economic spectrum do we have the type of competition and efficiency envisioned by the National Transportation Policy [49 U.S.C. 10101(a)(7)].

In our notice, we proposed that applicants seek broad authorities by requesting commodity descriptions similar to the groupings of the STCC. In light of the comments filed, we are now of the view that the STCC should not be mandatory. Instead, we shall permit applicants to seek authority commensurate with their business requirements as long as the requested authority is not unduly narrow. While STCC describes many groups of commodities, it alone is not enough because it does not necessarily combine groups of commodities in the same grouping as we may authorize, e.g., bulk commodities. Moreover, the STCC groupings do not contain a fixed, exhaustive list of all commodities that may be transported under the various types of broad authority we intend to grant.

A STCC group or any other group will not limit the holder of authority to transporting only those items given on any list defining that group. Any other description proposed will be considered accept-

able *if* it is as broad or broader than the STCC groupings.

STCC, or any other group, does not limit the holder to transport only those items listed under a STCC generic group. Rather, the carrier shall also be able to transport all items that logically can be categorized as part of the group and any other commodities that relate to the manufacture or distribution of the specific items. Again, this recognition of implied authority as a corollary to a specific grant is hardly revolutionary.

What we mean when we speak of all items that can be categorized as part of a group is that a carrier, upon making a respresentative showing of items to be transported, will be authorized to transport any item generally accepted as being within the ambit of the group. This is the concept we now employ when we determine the scope of a carrier's authority which is described in terms of one of the categories listed in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 and 766 (1952), but which is not limited specifically to items in the *Descriptions* case. In these circumstances, carriers are allowed to transport any item logically in the *Descriptions* group, regardless of whether it is specifically listed.

Related to the manufacture or distribution of items shall mean that a carrier will be able to move the named items, all materials, equipment, and supplies used in the manufacture or distribution of the items (including advertising), all return or rejected shipments, all empty returned containers, and all parts and accessories to the items. In other words, the authorization is intended to let the carrier transport items reasonably implied in the grant. Therefore, when we authorize a carrier to transport a group, we

will authorize a carrier to transport the commodities logically related to it in that group. Once a representative showing of the group is made, we will consider a need for the entire group proven and shall authorize a carrier to perform a complete service. A similar approach has been used by the Commission in the past. For example, no specific authority to transport accessorial commodities and advertising materials in conjunction with and at the same time as authorized commodities is required. The authority to do so was implied. See *Pre-Fab Transit Co., Ext.—International Falls*, 112 M.C.C. 664, 692-94 (1970), *Warren Transport, Inc., Ext.—Lodi, NJ*, 119 M.C.C. 107, 116-17 (1973). A representative showing will be deemed sufficient to constitute a prima facie case of need for the entire group. Such an approach, we believe, is consistent with the overall statutory and regulatory objections described here. Carriers will be expected to ask for groups like those stated in Appendix A whenever possible as these reflect our determination of what constitutes reasonably broad descriptions and most conform to the authorizations we will make.

Our proposal has drawn a number of comments with respect to the specifics of the STCC code. Many remark that we should use another set of descriptions in our authorities. Other views are expressed about: (1) those STCC categories, subdivisions, and exceptions which should be included or excluded, (2) how we should deal with unclassified commodities and private industry classifying them, and (3) whether materials, equipment and supplies should be included in each group.

A. *The Descriptions To Be Used.*

Most of the concerns over the employment of the STCC code are rendered moot by our decision to make the code permissive rather than mandatory. We do, however, urge the use of the descriptions in Appendix A whenever possible, as it best illustrates the generic forms of authority which we believe consistent with the statutory requirement that we broaden unreasonably narrow descriptions. Other alternatives suggested by the comments—retention of certain existing descriptions, use of descriptions based on the National Motor Freight Classification (NMFC), the *Descriptions* case, the Standard Industrial Code (SIC), or those proposed in Ex Parte No. MC-135, *Master Certificates and Permits*—have merit (if modified to generic forms). These suggestions, although offering alternatives to the STCC code, nonetheless reinforce our view that the shipping and trucking communities recognize the utility and desirability of reasonably broadening commodity groups into an understandable, yet discrete list—even though given commentors may disagree as to the precise scope of the list. While we see no need to discuss potential alternatives to the STCC code in the context of this proceeding, we offer our view on the alternatives presented to give the public some guidance concerning commodity descriptions likely to be accepted in the future.

We believe, in general, that NMFC and SIC contain too many classifications, while *Descriptions* and Ex Parte No. MC-135 in their present form do not cover the full range of commodities carried, contain too few. NMFC, which now provides thousands of groupings, would have to be pared to a number and type almost identical to the STCC to achieve a useful purpose. SIC, as proposed with modifications by

North American Van Lines, suffers from this same fault. Even though it is organized in terms of industry, rather than commodity, there are too many categories which, when pared down, will give roughly the same number and kind as those under the STCC approach. *Descriptions* and *Master Certificates*, on the other hand, would have to be expanded to cover all categories in a fashion that is not unduly narrow.

Thus, none of the alternatives appears to be more realistic than STCC as reflective of our overall objectives.

B. *Items To Be Included or Excluded from STCC.*

Numerous comments ask us to combine two categories into one category, subdivide categories, exclude types of traffic from categories or add additional categories.

We need not address these issues since we have decided to leave to individual carriers the option of selecting those reasonably broad commodity definitions which best meet their business needs, either immediately or in the reasonably near future. In this connection, we reject the suggestion of those commentors who argue that we should preclude a carrier from seeking authority to carry goods unless it currently holds the proper equipment. The holding of operating authority from the Commission in a broad form has the salutary effect of making those certificate holders potential entrants into new markets once equipment is obtained and there is no regulatory reason to restrict the certificate only to those specific commodities for which the carrier currently possesses the requisite equipment. We will, instead, leave those operational and marketing determinations to managerial discretion.

For similar reasons, we see no public interest purpose in expressly excluding particular items from various categories.

We will make one exception relating to general commodities. In our notice, we proposed to exclude household goods and classes A and B explosives from this authority. Household goods were to be excluded because of pending legislation and classes A and B explosives because of safety reasons. We now decline to except household goods, but classes A and B explosives shall remain excluded for safety reasons. The Household Goods Transportation Act of 1980, as finally passed, did not set up an exclusive licensing category for household goods. Since there was no other reason for our original proposal to exclude household goods from general commodities, we will not do so. As we have stated, type of service is no longer a valid reason to exclude a subcategory of goods.

We offer two observations with regard to aggregating commodity groups. On the one hand, some comments suggest that we allow a composite of several proposed groups where a new field-of-service description is better suited to the needs of the industry. This appears reasonable. Included now as groups will be commodities in bulk, commodities which because of their size or weight require the use of special handling or equipment, household goods, building materials, and *Mercer* commodities [*Mercer Extension-Oil Field Commodities*, 74 M.C.C. 459 (1946)]. These categories all deal with specialized services for a variety of goods that would fall into several STCC groups. Since the field-of-service terminology is consistent with the generic view of licensing and is attractive to both carriers and shippers, we will allow its use in the instances described above.

On the other hand, we are urged by some commentors to segregate commodities within existing groups. Commodities such as mail and express traffic, freight forwarder traffic, shipper association traffic, and traffic under the descriptions of such commodities as are dealt in or used by specific business concerns are all within the category of general commodities and carriers should consider whether they wish to receive general commodity authority, although we plainly do not foreclose applications narrower than requests for general commodity authority. Secret and sensitive materials will be deemed as subsumed in ordnance and accessories for our purposes. Drugs and alcohol, as requested by Nelson and Harding, are chemicals and food products respectively and they should be so applied for.

C. *Addition or Reduction of Items.*

Many commentors suggest we have special petition proceedings to determine in which group a new commodity belongs. However, we shall deal with unclassified items as we always have. New items may be transported under any logical generic category until there is a formal determination to the contrary. Our use of generic terms does not limit licenses specifically to the articles in the STCC listing, but includes anything logically within the ambit or the broad wording. This also means nongovernmental authorities do not control our lists, although their decisions will be given great weight in any determination we are called upon to make about the proper classification of an item.

D. *Materials, Equipment and Supplies.*

Congress, in mandating that we encourage competition and efficiency, intended that we authorize carriers to perform complete services for shippers.

We cannot grant less than authority for total service and remain within the statutory bounds.

Part of the complete services is the ability to transport those items needed to produce the principal goods. Requiring proof of the movement of these goods would obviously serve no purpose, because authority to transport them will be granted whether or not there is proof of their movement. We will therefore as a rule not require proof to authorize their movements as an adjunct to the principal commodities.

We note in this regard that the Commission has traditionally granted return authority for these commodities as a matter of course. Requests for materials, equipment, and supplies on return were rarely, if ever, protested. Thus, a stricter view as advocated by the commentors would serve no useful regulatory purpose. Moreover, in light of the Congressional policies evinced in 49 U.S.C. 10922(h)(1)(B)(iii), requiring that round-trip authority be provided, adoption of the commentors' stricter views are not warranted.

E. *Summary.*

In sum, we believe the use of a limited number of generic commodity descriptions will best serve the purpose of the new Act. The ones that carriers ordinarily should apply for are listed in Appendix A. All others are discouraged, and deviations will require some justification. Alternative descriptions must be framed in broad, generic terms.

Territorial Descriptions

The Act introduces new considerations in our determination of route and territorial descriptions in

motor carrier authorities. As we considered in broadening commodity descriptions, we must consider the productive use of equipment (including fuel efficiency), the salutary effects of competition and potential competition, service to small communities, the promotion of intermodal transportation and the ability of carriers to meet changing market demands in considering geographic descriptions [49 U.S.C. 10101(a)(7)]. Furthermore, as previously explained, we must in the future grant authority free of gateway restrictions and narrow territorial limitations. See 49 U.S.C. 10922(b).

In our notice, we proposed to implement these goals by using broad terms in route and territorial grants. While many commentors agree that we should issue broad authorities, a number question if there will be sufficient public support in most applications to warrant a grant of authority under traditional Commission or judicial decisions. The decisional standards for Commission action have been substantially changed by the Motor Carrier Act of 1980 and we believe that the critical underpinnings of the new law support our modest expansions of the geographic descriptions in most cases. We confirm their use and request that applicants, whenever possible, frame all future grants in these terms.

A. *Common-Carrier, Irregular-Route Service.*

We proposed three modifications to common-carrier, irregular-route authority to grant broader territories. They are use of two-way authorizations,[1] service areas no smaller in size than countywide, and

[1] Grants are to be framed radially, i.e., between points in * * * on the one hand, and, on the other, points in * * * or nonradially, i.e., between points in * * *.

receipt of authority to serve points in Alaska and Hawaii as part of an authorization to serve points in the United States. These changes should help eliminate the basic problem with irregular-route service as it pertains to the goals set forth above, namely the inability of existing carriers to provide needed service because they do not possess the necessary authorities.

The inability to provide service as it pertains to two-way authority manifests itself as an inability to return from the destination area with a load in spite of available traffic. The Act, in Section 6, recognizes this as a problem with existing authorities and directs that existing carriers be given two-way authorities to curtail this problem. We believe future grantees are in no less of a need for two-way authorities and that the bilateral imperative is equally valid for new entrants.

Commentors argue that we cannot grant such authorities automatically because carriers must still show public need for return service. We believe we can make such authorizations without specific evidence in this regard. We must as a rule authorize carriers to perform a complete service. With respect to commodity groups, this means granting the ability to carry all items needed in the goods' manufacture or distribution, as well as the goods themselves. The items needed in the manufacture or distribution (principally materials, equipment and supplies) are generally moving to the production facilities, for that is where they will be used. Congress recognized this in the part of Section 6 dealing with two-way authority. We interpret the legislation as intending that carriers get two-way authority not only for the identical items but also for material, equipment, and sup-

plies. Thus, evidence of a public need for return service, while useful, is not necessary. The useful public purpose is inherent in the evidence for outbound movements.

Countywide minima are but a minor incursion but do begin to attack the problem of carriers having an insufficient service base. Carriers often cannot serve other consignors or consignees in the general area of existing customers because their authority is limited to plantsites or very narrowly defined places. Discouraging minute limitations on the area an irregular-route carrier can serve should cure this problem.

Comments about countywide service minima fall into four general groups. Many remark that typically there will be insufficient express support for authorizing an entire county, especially when support is limited to one shipper. Others state, with some justification, that authorizing counties will limit the authority carriers would otherwise receive through grants of commercial zones. The third group believes that, as a policy matter, we should not authorize counties, because they are not integral economic units like cities. Finally, there is belief that the term county is too inexact, because places can better be described by city names and not all areas to be served are described as counties.

The sufficiency of evidence in support of authority for an entire county is, we believe, largely a residue from Commission and court decisions before the Motor Carrier Act of 1980. As discussed in more detail in our unanimous decision in *Art Pape Transfer, Inc., Ext.-Commod., in End-Dump Vehicles*, 132 M.C.C. 84 (1980), Congress has substantially altered the decisional standards in motor carrier licensing cases. While we do not purport to predict here what

evidence would be sufficient in any given case to support a grant of new authority, we believe that the statutory directive to expand unreasonably narrow geographic descriptions, coupled with the new emphasis on competition and efficiency, should, by themselves, be sufficient to justify the grant of countywide authority in the absence of a showing to the contrary in a given case.

The commercial zone problem raised in the comments can be resolved by having an applicant seek authority to serve a city if that city's commercial zone is territorially larger than all points in the county in which the city is located. Thus in these circumstances the city and its commercial zone would be the territorial minima (e.g., Chicago, IL, rather then Cook County, IL).

We appreciate that a county is not necessarily an integral economic unit, i.e., a community. Since the countywide description is merely a minimum, the issue is the smallest unit which will be consonant with statutory policy. We believe most often this will be the county. We are not wholly inflexible on this point, however, and will accept an alternative geographic unit—such as a large city which is included physically within a county—if parties can show this would be justified and not inimical to Congressional policy.

Lastly, the problems of name recognition and county descriptions are not deterrents to our proposal. Most points recognizable by name are large enough to come within the commercial zone option. In any event, we expect applicants to seek authority much more extensive than the minimum. Grants for entire States would tend to obviate recognition problems.

The county description problem arises in very few situations and the rule proposed in Ex Parte No. MC-142 (Sub-No. 1), *supra*, offers an appropriate remedy. As stated there, counties mean a county in a State, a judicial district in Alaska, a parish in Louisiana, a city, town or village in any State which is not administratively part of a county, New York, NY, Washington, DC, and their commercial zones.

Transportation to Alaska and Hawaii is authorized to encourage service to these points, especially by intermodal arrangements. The Sea-Land companies oppose the proposal on the basis of the difficulty in serving points in Alaska. This is not a reason for denying service to these points. Rather, we shall leave the decision to applicants and the marketplace. Where applicants justify a need for service in the entire United States, it will include service to points in Alaska and Hawaii.

B. *Common-Carrier, Regular-Route Service.*

Service over regular routes under our proposal is to be two-way, with authorization to all intermediate points and those off-route points specifically sought by applicants. Authorizations styled in this manner will provide for the productive use of equipment and service to small communities, two of the major goals of the Act.

Comments on these features of our proposal again question whether we can grant two-way authority without proof and also question whether prohibition of all intermediate point restrictions will lead to circuitous routes to avoid serving an unprofitable point.

Two-way authority, in our belief, goes to the very core of regular-route service which almost always is

for general commodities. It is rare that a shipper or community would not have both inbound and outbound service needs. Our view here is analogous to the policy for irregular-route carriers, where every grant should include authority to ship the materials, equipment, and supplies needed to produce the items. Moreover, it is supported by Section 6 of the new Act, as previously stated.

We doubt that carriers will apply for irregularly shaped regular-route authorities to avoid serving some immediate points. The Act gives carriers the ability to price their services at profitable levels so service to all points on a route should be desirable. Finally, service volume can be tailored to points where there is little traffic.

C. *Contract Carriage.*

Many commentors argue that we cannot automatically authorize service between points in the United States to contract carriers because there will be no support for such grants and since there will be problems with State regulations and insurance. On the other hand, the Contract Carriers Conference believes that this particular territorial authorization is exactly what contract carriers need to render complete service.

We are inclined to agree with the Contract Carrier Conference, and further believe that the Commission by law cannot limit the territorial scope of contract-carrier operations [49 U.S.C. 10923(d)(1)]. We do not intend to examine the territorial scope of a contract carrier's proposed operation. Any review of applicants' evidence in these applications must be limited to whether there is a need for service at all, not how extensive that need is.

Unacceptable Restrictions

Restrictions have been a part of motor carrier law since its inception in 1935. They have been imposed either to reflect accurately the service to be provided when there is no other means by which to describe the service or to protect the interest of protestants. In the latter connection, they have also been used over time to eliminate opposition by preventing authorization of competing services. See *Fox-Smythe Transp. Co. Extension—Oklahoma*, 106 M.C.C. 1 (1967).

No matter what reason is given for imposing restrictions, it cannot be denied that restrictions create burdens on interstate commerce. Our task has been to make sure that these burdens do not outweigh the benefits otherwise expected to flow from authorizations of service. We have made numerous expressions on restrictions to delineate those which are nothing but burdens. See *Fox-Smythe, supra.* Yet, there are many restrictions still being used which for one reason or another create wholly unwarranted burdens on commerce.

Congress in the Act has clearly instructed us to eliminate restrictions which needlessly burden interstate commerce. Carriers now must be authorized to make the most productive use of equipment and energy resources while meeting the diverse demands of the shipping public [49 U.S.C. 10101(a)(7)]. Carriers with existing authority may obtain this service goal by expanding their authority beyond narrow territorial and commodity descriptions and unreasonable restrictions, including those which are wasteful of fuel, inefficient, or contrary to public interest [49 U.S.C. 10922(h)]. We believe future grants should be equally as broad and as unencumbered as those which are to be cleansed through the restrictions re-

moval programs. Therefore, we intend generally to disallow all restrictions except those implicitly or expressly acceptable in the Act (as discussed in other sections of this decision).

The prior notice details how restrictions like those relating to facilities, interlining, equipment, and commodities militate against the purposes of the Act and therefore cannot be tolerated in the future. The comments on this subject confirm our original judgment. Those arguing for retention of the traditional types of restrictions claim that they are needed to prevent needless protests, that they delineate types of service and service areas, and that they are allowed by the Act since only unreasonable restrictions are to be prohibited.

We do not believe that restrictions are likely to affect protests under our current application process. The evidence filed with the application is the totality of an applicants case. Once a decision-notice is published in the Federal Register (prerequisite for protests), applicant will ordinarily receive the authority unless the protestants can show fitness problems or that the grant would be inconsistent with public convenience and necessity. Protestants have a difficult burden to bear, whereas applicant has already done all that is expected of it, although it may file a reply statement. Consequently, restrictions would save applicants little or no costs. The time differential between opposed and unopposed cases is also essentially inconsequential, given that all our decisions must be issued within strict limits. Totally unopposed applications are being decided in about 90 days while opposed applications are being decided in under 180 days. In sum, we see no real benefits to applicants by allowing restrictions and a large public benefit from not doing so.

Those stating that restrictions properly delineate services or service areas give a host of reasons. The American Trucking Associations believes this furthers economies and efficiencies because carriers can confine their service to the type they wish to perform. Others follow this argument by claiming that size and weight, automobile services, and bulk services all require special equipment that most carriers do not operate and should not have authority to operate since they cannot do so efficiently. In addition, proponents of bulk restrictions claim that many operators do not have cleaning facilities for bulk equipment, do not know the safety regulations for hazardous bulk items, and cannot meet the special insurance limits for the handling of hazardous materials. Lastly, proponents of plantsite, interline and related restrictions claim they are needed to define service that cannot otherwise be defined.

Once again we find none of these reasons persuasive in light of the National Transportation Policy to encourage competition. In the first place, the opposing arguments are based in part on the assumption that new carriers should not compete with existing services. The statute, however, assumes that overall transporatation economies and efficiencies are obtained by encouraging competition. While it is true that every carrier does not operate every type of equipment all of the time, nothing is gained by limiting authorities merely because the applicant does not already have the special equipment. To do so would only tend to entrench the status quo contrary to the new Act. Secondly, the arguments assume that carriers will be required in the future to perform service to the full extent authorized in their certificates.

The Commission will consider the scope of the common carrier obligation. Full explanation of our

ideas concerning the common carrier obligation will be presented in a future proceeding, along with an opportunity for the public to participate fully in the development of the final approach to the topic.

Also, nothing is gained by limiting service because of the special demands of bulk service. These demands are ones that can be mastered by others; thus, limiting authority because of them is unnecessary. Lastly, since territories can be framed without plant-site, interline, or similar restrictive language, the only purpose in continuing to use such language is to limit competition. This, of course, cannot continue.

Those arguing that we cannot foreclose restrictions aver that the Act only gives us the ability to eliminate obviously unreasonable restrictions from existing authority. As we have discussed throughout this statement, we do not view the Act in such narrow terms. We have the ability to specify what language is used in future grants as well as existing grants, and this ability includes prohibiting restrictive language.

Finally, we must discuss the future imposition of tacking restrictions on carriers' authorities. We believe that Congress' enactment of Section 6 of the Act had the effect of precluding the future granting of authorities where gateways or circuitous routes would have to be observed. Clearly, Congress did not intend that we continue to grant authorities with defects similar to those to be removed. We also believe that it is reasonable to infer that Congress, in not addressing capability to tack but merely the existence of indirect routes, recognized and approved of the existing abilities of motor carriers of property to tack. These abilities are described in detail in Ex Parte No. MC-142, *supra*, at 176.

That being the case, it is incumbent upon us to decide what is the proper mechanism for motor carriers of property who wish to combine a proposed operation with an existing operation to provide a direct service.

Irregular- to irregular-route tacking has been largely abolished. As is explained in the final rules in Ex Parte No. 55 (Sub.-No. 43), *Rules Governing Application For Operating Authority*, the proper, and more simple method, is for the applicant to request direct service in its application. So-called "gateway elimination" applications involving irregular- to irregular-route authority are forbidden in the future. However, this does not in any way alter the irregular route applicant's ability to seek direct authority which would accomplish the same thing. We see this as more a change in form than in substance. The public will benefit, however, since many of the inherent complexities of gateway elimination proceedings will be avoided.

Regular- to irregular-route tacking (and vice versa), with resultant direct service being permissible, will continue to be allowed. The Commission will not entertain restrictions against tacking those combinations of authorities. The final rules in Ex Parte No. 55 (Sub-No. 43) indicate the proper caption summaries for those applications; irregular-route applicants have to indicate in the caption summaries the fact that they hold regular-route authority with which a direct service may be provided.

Fitness Only Applications

In our last report, we proposed individual descriptions for the seven different authorities to be granted upon a showing of applicant's fitness. The seven authorities are (1) transportation to a community not

regularly served by a carrier, 49 U.S.C. 10922(b)(4)(A); (2) transportation as a substitute for abandoned rail service, 49 U.S.C. 10922(b)(4)(B); (3) transportation for the United States Government, 49 U.S.C. 10922(b)(4)(C); (4) transportation of shipments weighing 100 pounds or less when no shipment in the vehicle exceeds 100 pounds, 49 U.S.C. 10922(b)(4)(D); (5) transportation by an owner operator of food and related products when acting as a common carrier, 49 U.S.C. 10922(b)(4)(E); (6) transportation by an owner operator of the same products when acting as a contract carrier, 49 U.S.C. 10923(b)(5)(A); and (7) brokers of property, 49 U.S.C. 10924(b). We here confirm use of our proposed descriptions for these authorities with some minor changes. We shall establish a new description for pack-and-crate authority which also is subject to fitness-only licensing by the Household Goods Transportation Act of 1980. See 49 U.S.C. 10922(b)(9).

A. *The Descriptions in General.*

We have received several comments that argue granting these authorities to points in the United States is broader than necessary. Authority not limited in territory, it is argued, is beyond the scope of the service to be provided by most applicants and will subject applicants to violation of the common carrier obligation. It will also create problems in obtaining insurance and complying with the requirement of a registered agent for service of process in each State.

We do not believe that excessive authority will be granted. Since these applications are based only on applicants' fitness, willingness, and ability to serve the public, not on a showing of public need for the

service, limiting the territorial scope of the authority to protect competitors is a moot issue. Congress, in adopting specified "fitness" categories, has determined that the Commission shall have no economic regulatory control over this traffic. The only issue that remains for consideration is whether the carrier is fit, willing and able to perform the service, as set forth in the statutory definition. The only purpose in framing grants at all is where this is required to conform the authorized operation to the scope of the statutory definition. Thus, for example, the service authorized to a community not regularly served must be defined in terms of a community. Once having determined the proper extent of what a "community" is, we must end our attempt to describe further the terms of the service, since we are to have no role in assessing the economic impact of the authorized operation.

Lastly, we find no difficulty with insurance or registered agents. The comments argue that the costs of these items to a carrier with nationwide authority are so high that they will deter potential entrants from even seeking this authority in the first place. There is no evidence to support such a conclusion, and we see no reason to limit authority because of these theoretical problems. If however, experience shows that insurance and the designation of agents is a problem for the small specialized carrier we will of course, work with the industry to ameliorate any problems brought to our attention.

B. *The Descriptions in Specific.*

Comments about specific descriptions tend to address difficulties with either the scope of the authority underlying the description or the language we use

in the description. The remarks will be summarized in our discussion of each topic.

1. *Transportation to Any Community Not Regularly Served by a Motor Carrier.*

This authority is designed to encourage service to communities with a chronic lack of supply. The Department of Justice (DOJ) remarks that we should not require a carrier to show that no service is ever available to such a community prior to granting this type of authority. We agree with DOJ that the terms "not regularly served by a motor common carrier of property" does not mean a community must have a total lack of service; rather, it means the community must have something less than adequate service from common carriers for its particular transportation needs. An example would be bulk service is not regularly available when there are bulk items regularly to be moved. However, the statute does indicate that unmet demand must be a recurring problem. Problems that create emergencies should be handled by obtaining emergency temporary authority; problems that recur should be handled by obtaining permanent authority. Infrequent problems should be handled by obtaining temporary authority.

The description to be used for this authority shall be the following:

> To operate as a *common carrier*, by motor vehicle, in interstate or foreign commerce over irregular routes, transporting (commodity group) ————between (the specified community(s)), ————on the one hand, and, on the other, points in the United States.

2. *Transportation Service as a Direct Substitute for Abandoned Rail Service.*

This authority is issued as a direct substitute for rail service if an abandonment results in a community not having any rail service and if the application is filed within 120 days after we have approved the abandonment. The questions raised by commentors are whether authority under this section must always be for general commodities, whether the term "community" is synonymous with county (the minimum area we intend to authorize in other common carrier applications), and when does abandonment for purposes of this section occur.

We indicated general commodities is the proper description, because railroads typically handle all types of freight. Where lesser authority is appropriate we will entertain more limited applications. However, these situations should be rare.

The term community here, as well as in the previous section, is an exception to our county rule because of the statutory terminology. A carrier may apply for smaller sized areas where the evidence would support only that.

Abandonment for purposes of this section occurs when two things happen. First, all rail service to the community is eliminated by the abandonment in issue. Second, either the certificate of abandonment is issued by us or another pronouncement by us states abandonment has occurred. Carriers thereafter have 120 days from the date of issuance of either the pronouncement to file for this authority.

> Applications for this authority shall read as follows: To operate as a *common carrier*, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting *general com-*

modities between the abandoned community(s)), on the one hand, and, on the other, points in the United States.

3. *Transportation for the United States Government.*

The Act largely codifies the rules we adopted in *Transportation of Government Traffic*, 131 M.C.C. 835 (1980). The Department of Defense (DOD) therefore believes the description for government traffic should be the one established in those rules. The General Services Administration (GSA) further claims that the household goods exclusion should only run to so called "first proviso" traffic [as defined by the Commission at 49 CFR 1056.1(a)(1)], since "second" and "third proviso" traffic [49 CFR 1056.1 (a)(2) and (3)] represent normal commercial freight. GSA also urges that hazardous materials should be defined as in *Government Traffic, supra.*

We agree with DOD that the description used in *Government Traffic, supra*, is generally appropriate, but there must be certain modifications. The description, slightly modified to comport with the terms of the Motor Carrier and Household Goods Acts, is set forth at the end of this subsection. However, we cannot agree that the definitions proposed by GSA for used household goods and hazardous materials are appropriate. They lack the proper context needed to apply the two new laws.

GSA's claim that second and third proviso commodities should be included in these grants (by limiting the exclusion for household goods to the first proviso), misconstrues the meaning of household goods. The definition of household goods, now codified by the Household Goods Transportation Act of 1980

at 49 U.S.C. 10102(10), is nonexclusive. When an item listed under the definition moves by a carrier using the special handling and equipment associated with household goods, it is considered to be a household good. When the same item moves otherwise, as GSA claims can happen, it is within the ambit of general commodities authority. Thus, excluding of second and third proviso traffic from the exception would serve no useful purpose.

The *Government Traffic* decision does not use the term "hazardous materials" in its description. Rather, it refers to "classes A and B explosives, radioactive materials, and etiologic agents" as hazardous items to be excluded. "Hazardous materials" actually includes more items than these three classifications. A prominent example would be corrosive chemicals. Thus, the statutory exclusion of hazardous materials is broader than the ones we used in *Government Traffic*, *supra*, and we are bound to comply with the Act.

The description for these items shall be:

> To operate as a *common carrier*, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting, for or on behalf of the United States Government, *general commodities* (except used household goods, hazardous or secret materials, and sensitive weapons and munitions), between points in the United States.

4. *Transportation of Shipments Weighing 100 Pounds or Less if Transported in a Motor Vehicle in Which No One Package Exceeds 100 Pounds*

The commodity description of "shipments weighing 100 pounds or less" has resulted in some confusion.

Commentors ask whether this should be phrased in the statutory language. Otherwise, as shown by one company's query, we will constantly be asked to state whether there can be other traffic in the same vehicle.

This provision is designed to encourage small shipment services. The statute not only eases entry for this particular type of service but also creates a class of contraband which cannot be moved in the same vehicle without destroying the authority. Thus, on any given day, a carrier is only allowed to ship a package or aggregate of packages weighing 100 pounds or less from one consignor to one consignee if no package in the vehicle exceeds 100 pounds. See H. Rept. 96-1069, p. 16. Any higher-weighted packages are contraband even if the carrier holds other authority under which they may be moved. We must agree that interpretative difficulties can best be overcome by using the statutory language. Therefore, all applications for this authority are now to be phrased as:

> To operate, as a *common carrier*, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting *shipments weighing 100 pounds* or less if transported in a motor vehicle in which no one package exceeds 100 pounds, between points in the United States.

5. and 6. *Transportation by Either a Common or Contract Carrier of Food and Other Edible Products and Related Farm Items.*

Two points are raised by the comments we received about these authorities.

One states that we incorrectly describe the test for the amount of traffic an owner operator can handle.

We stated that the operator can carry traffic in an amount equal to the exempt commodities transported, while the Act states an operator may transport an amount not to exceed the exempt tonnage transported. The correct usage of terms should be an amount not to exceed; thus, no owner operator may transport more than the exempt tonnage handled.

Second, several commentors ask what are the emergency situations in which the owner of the vehicle does not have to be in the vehicle as stated in 49 U.S.C. 10922(b)(4)(E)(i) and 10923(b)(5)(A)(i). These situations are under study in Ex Parte No. MC-143, *Owner-Operator Food Transportation*, 132 M.C.C. 165 (1980), and are beyond the scope of the instant proceeding.

Finally, we will rephrase these descriptions to a minor extent to eliminate verbiage. Carriers are now to use these two descriptions.

For common carriage:

> To operate as a *common carrier*, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting *food and other edible products and byproducts intended for human consumption* (except alcoholic beverages and drugs), *agricultural limestone and fertilizers, and other soil conditioners* by the owner of the motor vehicle in such vehicle, between points in the United States.

For contract carriage:

> To operate as a *contract carrier*, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting *food and other edible products and byproducts intended for human consumption* (except alcoholic beverages and drugs), *agricultural limestone and fertilizer*,

and other soil conditioners by the owner of the motor vehicle in such vehicle, between points in the United States, under continuing contract(s) with (company)————of (domicile)————.

7. *Brokers of Property Moving in Motor Carriage.*

We have received no comments on this proposal. We remind all applicants that the proper description is:

To operate, in interstate or foreign commerce, as a *broker* of *general commodities* (except household goods), between points in the United States.

8. *Transportation for the United States Government of Used Household Goods Which Transportation is Incidental to a Pack-and-Crate Service on Behalf of the Department of Defense.*

Section 10 of the Household Goods Transportation Act of 1980 adds this type of authority as one requiring only a showing of fitness. It pertains only to pack-and-crate operations performed on behalf of the Department of Defense. We will use authority between points in the United States for the reasons described above, although carriers are warned that the transportation must be incidental to their pack-and-crate service. Any line-haul service requires regular authority. So called pack-and-crate movements with no prior or subsequent line-haul service are expressly prohibited. The proper description is the following:

To operate, as a *common carrier, by motor vehicle,* in interstate or foreign commerce, over irregular routes, transporting *used household goods* for the account of the United States Gov-

ernment incident to the performance of a pack-and-crate service on behalf of the Department of Defense, between points in the United States.

We emphasize, in connection with all fitness-only applications, that the Congress has carved out specific categories for special treatment. Although, in certain circumstances, we are required to read the potential grants of authority narrowly, in conformance with the basic purpose of the statutory exceptions, nothing in our discussion should be understood to discourage applicants from seeking broader authority under the conventional certification process.

Energy and Environmental Considerations

The policy statement does not significantly affect the quality of the human environment or conservation of energy resources.

This statement is issued pursuant to 49 U.S.C. 10101, 10922, 10923, 10924, 11102, and 5 U.S.C. 553.

Decided: December 19, 1980.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Clapp, Trantum, Alexis, and Gilliam. Commissioner Clapp concurring in part and dissenting in part, and reserving his right to submit a separate expression at a later date.

James H. Bayne,
Acting Secretary.

Appendix A

The descriptions contained here are stated in the terms to be used in our authorizations. They differ from the list originally proposed in that they seek to group products better. The STCC number is

given for reference only and is not to be asked for. The meaning of a group is to be determined by reference to STCC, as defined by our explanation in this statement, or, if there is no STCC, to the meaning usually ascribed by the Commission. Other descriptions may be used if they comport with the principles in the decision.

STCC

01—Farm Products
08—Forest Products
10.14—Ores and Minerals
11.29—Coal and Coal Products
13.29—Petroleum, Natural Gas and Their Products
19—Ordnance and Accessories
20—Food and Related Products
21—Tobacco Products
22, 23—Textile Mill Products
24—Lumber and Wood Products
25—Furniture and Fixtures
26—Pulp, Paper and Related Products
27—Printed Matter
28—Chemicals and Related Products
30—Rubber and Plastic Products
31—Leather and Leather Products
32—Clay, Concrete, Glass or Stone Products
33, 34—Metal Products
35, 36—Machinery
37—Transportation Equipment
38—Instruments and Photographic Goods
40—Waste or Scrap Materials Not Identified by Industry Producing
49—Hazardous Materials
—General Commodities (except Classes A and B Explosives)

—Commodities in Bulk
—Those Commodities Which Because of Their Size or Weight Require the Use of Special Handling or Equipment
—Household Goods
—Building Materials
—*Mercer* Commodities

Appendix B

Comments received by the Commission indicate divergent points of view about both what the Motor Carrier Act of 1980 (the Act) means for the industry and how we, through this policy statement, should interpret the Act. We here summarize the comments, categorizing each by the group represented. The categories are trucking and other associations, Commission practitioners, individual carriers, government agencies, and miscellaneous groups. The evidence is also summarized in the body of the policy statement.

A. *Trucking and Other Associations*

American Trucking Associations, Inc. (ATA), agrees with us that the intent of Congress is to have reasonably broad grants of authority in the future. However, it believes this proceeding goes beyond the Congressional mandate and attempts to master license carriers. As an example of this attempt, it cites our failure to deal with conversion of contract to common authority when a contract carrier holds points in the United States and is providing much less service. It also argues that we should treat the Notice and the comments received as an advanced notice of proposed rulemaking because the policy statement attempts to enact rules in a manner prohibited by *American Bus*

Association v. *United States*, No. 79-1207 (D.C. Cir., 1980).

More specifically, ATA believes plantsite restrictions can be eliminated, but that countywide origins are too broad. It argues nothing is wrong with basing grants on representative showings, but if there is less evidence, carriers should be given an opportunity to limit their authority appropriately. ATA believes that equipment and service restrictions promote economies and efficiencies. It argues that without restrictions there is master licensing and the opportunity for unnecessary protests.

The majority of ATA's statement is devoted to commodity descriptions. It believes a code concept is workable. However, it believes the proposed STCC is too broad and not responsive to motor carrier transportation. As a result, ATA proposed a STCC code of its own using 51 parts and subparts. It also urges the Commission to allow for three types of descriptions to meet carrier needs. These are service descriptions, specific commodity descriptions and generic descriptions. It further urges that several common descriptions such as the size-and-weight descriptions should be kept so carriers do not have to ask for a myriad of STCC groupings. Finally, ATA comments that new items to a group should be Commission approved with carriers operating under temporary authority until approval.

Other trucking associations enter evidence as it pertains to their particular specialty area. The National Tank Truck Carriers, Inc. (NTTC), favors retention of the bulk restriction. It argues that bulk arose historically, not as a line of demarcation for commodities, but as a type of service. It states that if STCC is used there should be a bulk group so that a carrier

may ask for a STCC class either in bulk, in containers, or in both. NTTC notes there are special insurance limits in the Act for hazardous chemicals as well as explosives and believes these too must remain excluded from descriptions like general commodities.

The Regular Common Carrier Conference, Inc., believes none of the general commodities limitations should be removed because removal would compel carriers to perform service they are not equipped to perform. It also believes we should continue allowing carriers to ask for restrictions because Section 6 of the Act says we may, not must, remove unnecessary restrictions. The only provisions it finds mandatory is the section on circuity limitation.

The Contract Carrier Conference totally supports giving contract carriers authority to serve points in the United States. It states that authorities now are too restricted to meet public needs.

The American Bus Association asks that all carriers of shipments weighing 100 pounds or less be required to seek authority in terms of the statutory language. It does not agree with the idea of county-wide authority and the prohibition of equipment restrictions and restrictive amendments. The Association believes this proceeding should not apply to passenger applications.

The National Automobile Transporters Association (NATA) wants the status quo maintained for automobile carriers. It believes there should be a STCC class for automobiles with restrictions to initial or secondary movements and driveaway or truck-away service. NATA would also like general commodities and plantsite restrictions maintained. It argues overall that this proceeding is an attempt to master license and that this proceeding must be a

rulemaking since there is no discretion in its application.

A variety of comments are entered by five independent associations including one traffic bureau. The Midwest Packers Traffic Association believes shippers, not carriers, should name the commodities and territories to be served. It wants to retain present descriptions and plantsite restrictions to obtain this goal.

Food Marketing Institute supports authorizing contract carriage between points in the United States as a way of getting more carriers for the food industry.

The Aluminum Association, Inc., believes the primary and fabricated metal products categories should be one, since the same carriers haul both types of goods. It also urges that categories be open-ended, that "materials and supplies" be maintained as a description and that two-way and countywide authority be granted.

The St. Louis Regional Commerce and Growth Association wants commercial zones detailed on a county basis if countywide is the minimum territory.

Finally, the Motor Carriers Service Bureau, Inc., believes contract carrier service to all points in the United States is too broad, since there are rates and process service agent problems. It also states all carriers should be able to limit the scope of their authority by their holdings out in their tariffs.

B. *Commission Practitioners.*

The Motor Carrier Lawyers Association on behalf of its members enters a statement expressing the belief that there is little legal support for the policy statement and that the statement in contrary to Congress' intent. MCLA also asserts that this cannot be

a policy statement because of the *ABA* decision and other precedent. It seeks dismissal of this proceeding and to have all authority issued to applicants filing after July 2, 1980, voided.

MCLA further argues that the proposal ignores applicants' burden of making a prima facie case and the common carrier obligation. It believes the modifications proffered are unfounded for this reason. It, however, indicates that a proceeding less broad in scope that builds on existing precedent would be acceptable.

Remarks from individual practitioners are in the same vein as those from the MCLA. William J. Monheim agrees with MCLA that this proceeding goes beyond Congress' intent. He believes the STCC code is impractical, and that countywide authority for common carriers and points in the United States for contract carriers and owner operators is too broad. Furthermore, the removal of most restrictions, especially those on general commodities grants, is beyond the realm of the new Act.

James C. Hardman feels that this is an attempt to master license. He finds fault with not allowing carriers and shippers to shape their own grants and with removal of any restrictions beyond those found to be unreasonable.

Francis E. Barrett argues that countywide and statewide grants are beyond actual need shown and should not be given.

The law firm of Nelson and Harding also is against the STCC code. They believe the overbroad categories subvert the intent to help new carriers into the market by increasing the number of protests to be received. Even if a STCC code is used, they believe there should be a separate code for drugs and alcohol.

They also would like an index to the code. Among the items they wish to see maintained are general commodities with exceptions, materials restrictions, commercial zones over countywide descriptions, and plant-site restrictions.

Michael S. Varda believes the classifications made in Ex Parte No. MC-135, *Master Certificates and Permits*, would better serve the industry than the STCC code. He sees lack of proper equipment as a problem with giving someone STCC code authority. He also believes commercial zones larger than counties should be maintained and that contract carriers should be allowed to specify less territory to prevent insurance and process agent problems. Mr. Varda also wishes to keep restrictive amendments to aid in obtaining authority.

John W. Frame sees commodity description problems with the STCC code, but likes countywide authority as a way to deal with urban flight. He sees difficulties in granting two-way authority and wants us to rule that government traffic can move in the same vehicle as one carrying shipments weighing less than 100 pounds.

Thomas J. O'Loughin, Jr. wants us to retain STCC groups 44, 45 and 46. He states his clients deal in shipper association traffic only, the traffic described by 45, and do not want to obtain general commodities authority.

Lastly, Kermit N. McManus asks us to do an environmental statement in this proceeding.

C. *Individual Carriers.*

Comments from individual carriers tend to discuss both how the decision affects their operation individually and how it affects the industry overall.

American Farm Lines, Inc., believes that expedited processing of its petition to remove government traffic restrictions from its authority will let it meet the goals set forth in this proceeding to encourage competition.

C. B. Johnson, Inc., states that metallic ores is an incomplete description. A complete description would be one that allows carriers to transport ores and concentrates.

American Auto Shippers asks that decisions filed prior to the Act not be considered under the Act. It also believes there should be liberal backhaul and service extension policies.

C. W. Transport, Inc., wants all tacking restrictions removed. It now tacks irregular- to regular-route authorities in a circuitous manner and wants the ability to perform its operation more directly.

Interstate Motor Freight System believes our language about owner-operators hauling food and other edible products in an amount equal to the amount of exempt products is a misinterpretation.

Miller Transfer and Rigging Co. wants a size and weight group in the STCC and wants size and weight excluded from general commodities. It believes STCC groups are too broad and will be giving carriers more authority than they want or need.

Kenosha Auto Transport Corp., and Dallas and Mavis Forwarding Co., Inc., believe transportation equipment as a description is not as good as the automobile descriptions now in use. They believe STCC overall is not good for motor carriers and would like to have field of service descriptions by expansion of *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 (1952).

CRST, Inc., notes that tacking of irregular-route authority shall be prohibited. It argues that rather

than prohibit this tacking, we should have a rule of construction allowing carriers to go directly without passing through the gateway. This will help save energy and let irregular-route carriers compete more with regular-route carriers. CRST otherwise supports this proceeding.

Sea-Land Service, Inc., and Sea-Land Freight Service, Inc., believe we should continue to exclude points in Alaska from grants of authority, citing the unique Alaskan problems of no return loads, severe weather, sparse population, the fact that many locations can be only served by water, higher costs and use of so much fuel.

The Maxwell Company believes most of our proposals are sound but believes we should have a bulk group. This can be further refined to dump vehicles and tank vehicles, according to Maxwell. It also believes we should keep the bulk restriction to prevent protests and problems with hazardous materials. Finally, Maxwell states that we should continue to use commercial zones instead of counties because this will simplify descriptions.

Home Transportation Company, Inc., a heavy hauler, believes the proceeding is biased in favor of general commodities carriers, especially by removal of the restrictions. It believes we must in fairness issue authority as broad as the new general commodities authority to heavy haulers.

Global Van Lines, Inc., Imperial Van Lines, Inc., and Wheaton Van Line, Inc., household goods movers, believe that the three household goods descriptions now used should be maintained. They state that household goods as defined by the Commission, used household goods in containers, and *Kingpak* authority [*Kingpak, Inc., Investigation of Operation*, 103

M.C.C. 318 (1966)] delineate different services so there is no reason to combine them.

Steere Tank Lines, Inc., a bulk carrier, believes the Act put the *Pan American* criteria into law. It wishes that we strictly enforce STCC or forego using it for no one will pay attention to it if it is not mandatory. Steere would like to seek STCC expanded to include field of service authorizations such as commodities in bulk. It also wants the bulk restriction retained to prevent needless protests and supports countywide authorizations when there is proof. Steere calls for us to renotice this proceeding with the refinements mentioned.

W. S. Hatch Company, another bulk carrier, believes that this policy statement is a flawed rulemaking. It believes that STCC is not adaptable to trucks and that it should include a bulk category if used. Hatch wants a bulk restriction maintained as there are many hazardous bulk materials that are as dangerous as Classes A & B explosives.

Central Freight Lines, Inc., and 11 other carriers express the view that this should be a rulemaking, not a policy statement. It is seen as an attempt to master license. Also, they believe there is no authority in the Act to do anything except remove restrictions on existing authority. Specifically, they believe that the *Descriptions* case with amendments is better than the STCC code, that countywide authority and nationwide contract authority are too broad and that proven restrictions should be maintained.

Alvan Motor Freight, Inc., and twenty-three other concerns adopt the position taken by the Motor Carrier Lawyers Association in their comments. They further state that changes in existing authority should be made prior to institution of any changes in new authority.

Keep on Trucking Company, Inc., Steel Transporters of California, Ditto Freight Lines, and Interstate Distributor Company believe use of the STCC code is ludicrous; the better solution is to give all carriers general commodities authority between points in the United States. These carriers also believe our territorial ideas are too broad. They believe contract carriers do not need authority to Alaska and Hawaii and that larger authority will cause problems in complying with state requirements. These carriers also see a problem with redefining commercial zones if countywide authority is used.

Overnite Transportation Company favors the STCC code. It believes that any commodity not included can become included by applicant petition. It also argues that the *Descriptions* case should be automatically combined into the code. Overnite finds nothing wrong with elimination of general commodities exceptions since carriers will not provide services for which they are not equipped. It finds the hazardous materials class unnecessary and states that the *Federal Register* notice on tacking and interlining should be changed to conform to the Act.

Cooper Motor Lines, Inc., states that this proceeding is an attempt to master license and calls for it to be converted into a rulemaking.

Frozen Foods Express, Inc., wants grants of authority limited to specific shipper intent. It argues that existing descriptions more adequately describe the service to be rendered than the STCC code.

Daily Express, Inc., a heavy hauler, recognizes Congress' intent of reasonable broad authority but believes we are allowing master licensing. It believes it must be authorized authority which is the *quid pro quo* of what general commodities carriers will receive.

Daily asks that the *Descriptions* case be revised instead of using the STCC code. It believes we must promptly determine this matter, for people are already asking for authority.

North American Van Lines, Inc., contends that the STCC is inadequate. It proposes instead a modification of the Standard Industrial Classification of the Department of Commerce which groups by industry, not by commodity. Carriers would be granted authority to transport such commodities as are dealt in or used by one of 51 different categories. This, according to NAVL, will prevent constant administrative determinations of whether specific commodities are within certain groups.

Anderson Trucking Service, Inc., feels that this proceeding goes beyond the intent of Congress to have reasonable authorities. It also finds the proceeding defective in practical terms because it contains no field of service doctrine and grants unrealistic territories.

Matlack, Inc., a bulk carrier, seeks retention of bulk restrictions. It does not believe its attitude is protectionist but a natural division of the industry. It states that general commodities carriers do not own the proper equipment or cleaning facilities for bulk equipment. Matlack wants us to recognize six groupings of service and to build commodity descriptions from them. They are general commodities, bulk, special equipment, unusual value, class A & B explosives, and household goods. It believes such a scheme will maintain the common carrier obligation.

Alamo Express, Inc., and five other carriers argue that we cannot call this a policy statement because of its contents. They believe we are trying to grant more than what is shown for public need, that there will be needless protests, and that violations of the

common carrier obligation will arise because of STCC. These carriers want heavy-hauler service preserved as a class. They find all territorial proposals too broad and that all restrictions cannot be eliminated. The six carriers seek energy and environment impact statements.

Brannan Systems, Inc., and seven other carriers argue that the Act specifies authority only to the public need shown in each application. They argue that commodity descriptions should be framed on a case-by-case basis, that two-way authority should be granted only when supported by evidence, and that restrictions, including plantsite and intermediate point restrictions, are necessary. These carriers see our job as one of balancing interests under the criteria of the Act.

Arrow Truck Lines, Inc., and 15 other concerns are opposed to STCC for the problems it causes with broad grants of authority. They believe we should begin with the *Descriptions* case to build new authorities. These carriers also feel two-way and countywide grants and nationwide contract carrier authority are beyond the scope of evidence presented. Other items they wish retained are plantsite restrictions where there is only one supporting shipper and special service exceptions.

In a supplemental pleading, the aforementioned carriers reiterate their claim that communities, not counties, are the proper areas of service since counties are not integral economic units.

A group of 12 carriers and their law firm, Grefe and Sidney, also oppose STCC as too broad and not representative. However, they believe that shippers and carriers should determine the authority granted. They believe two-way and countywide grants will be

too broad except for two-way regular routes. They are against all intermediate points being served because they feel this will lead to circuitous, energy-wasting routes. They assert that nationwide contract carrier authority is too broad, presents problems of state regulation compliance, and is against Congressional intent. They wish to retain plantsite and tacking restrictions, stop interlining in cases filed after July 3, 1980, and eliminate equipment restrictions. Finally, they wish to have restrictive amendments to conform to the proof offered.

Celeryvale Transport, Inc., and eight other carriers believe the new Act constricts our powers to act and does not grant us authority to shape grants as we propose. They would like to see descriptions phrased in terms of such commodities as are dealt in or used by. General commodities with exceptions should be maintained, and no countywide descriptions should be used. They believe elimination of restrictions will violate the common carrier duty as carriers will simply sell their services to the highest bidder.

D. *Government Agencies.*

Government agencies participating in this proceeding are the Departments of Justice and Defense and the General Services Administration. The Department of Justice believes that we have enacted Congress' intent in this proceeding. It finds the STCC code to be productive and urges us to discontinue regular-route authority.

The Department of Defense believes all fitness only grants to carriers hauling traffic for the United States Government should use the terms in *Transportation of Government Traffic*, 131 M.C.C. 835 (1980). It

also wants household goods carriers to be limited to statewide authority as a minimum except for pack-and-crate operators which do not serve a broad territory. The Department wishes there to be a narrow definition of hazardous materials and would like to see a STCC for secret and sensitive shipments.

The General Services Administration believes that there is an inconsistency between this proceeding and Ex Parte 55 (Sub-No. 43), *Rules Governing Applications for Operating Authority*, because of a lack of definitions as to what are household goods and hazardous materials. A definition is needed to determine what traffic falls within government traffic fitness only applications. GSA urges that only first proviso household goods traffic be found to be outside of the fitness only criteria as second and third proviso household goods traffic is routinely shipped like general commodities. It also seeks to have hazardous materials defined as they were in *Transportation of Government Traffic, supra.*

E. *Miscellaneous Groups.*

The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America believes that the common carrier obligation must be emphasized in making grants of authority. It believes that grants should not be beyond the scope of the evidence and applicants' ability to serve. In conjunction with this point, the Union states that contract carriers do not need nationwide authority and countywide origins and destinations are too broad.

Kraft, Inc., states that its commodities fall under numerous STCC codes and that using STCC codes would increase paperwork in the applications it supports. It urges us to maintain "such commodities as

are dealt in by food business houses" as a description. It believes this will help with backhauls for carriers. Kraft likes removal of all restrictions and believes statewide territory is more appropriate then county-wide. For contract carriers, it wishes to see descriptions of "property for Kraft, Inc."

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APPENDIX K

Pertinent provisions of the Motor Carrier Act of 1980, unincorporated into Title 49—

PUBLIC LAW 96-296—JULY 1, 1980

Public Law 96-296
96th Congress

An Act

To amend subtitle IV of title 49, United States Code, to provide for more effective regulation of motor carriers of property, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Motor Carrier Act of 1980".

PURPOSE OF THE ACT

SEC. 2. This Act is part of the continuing effort by Congress to reduce unnecessary regulation by the Federal Government.

CONGRESSIONAL FINDINGS

SEC. 3. (a) The Congress hereby finds that a safe, sound, competitive, and fuel efficient motor carrier system is vital to the maintenance of a strong national economy and a strong national defense; that the statutes governing Federal regulation of the motor carrier industry are outdated and must be revised to reflect the transportation needs and realities of the 1980's; that historically the existing regulatory structure has tended in certain circumstances to inhibit market entry, carrier growth, maximum utiliza-

tion of equipment and energy resources, and opportunities for minorities and others to enter the trucking industry; that protective regulation has resulted in some operating inefficiences and some anticompetitive pricing; that in order to reduce the uncertainty felt by the Nation's transportation industry, the Interstate Commerce Commission should be given explicit direction for regulation of the motor carrier industry and well-defined parameters within which it may act pursuant to congressional policy; that the Interstate Commerce Commission should not attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation enacted by Congress; and that legislative and resulting changes should be implemented with the least amount of disruption to the transportation system consistent with the scope of the reforms enacted.

(b) The appropriate authorizing committees of Congress shall conduct periodic oversight hearings on the effects of this legislation, no less than annually for the first 5 years following the date of enactment of this Act, to ensure that this Act is being implemented according to congressional intent and purpose.

NATIONAL TRANSPORTATION POLICY

SEC. 4. Section 10101(a) of title 49, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (5);

(2) by striking out the period at the end of paragraph (6) and inserting in lieu thereof "; and"; and

(3) by adding at the end thereof the following new paragraph:

"(7) with respect to transportation of property by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers; (F) improve and maintain a sound, safe, and competitive privately-owned motor carrier system; (G) promote greater participation by minorities in the motor carrier system; and (H) promote intermodal transportation."

MOTOR CARRIER ENTRY POLICY

SEC. 5. (a) Section 10922 of title 49, United States Code, is amended—

(1) in subsection (a) by inserting "of passengers" after "motor common carrier";

(2) by redesignating subsections (b), (c), (d), (e), and (f), and all references thereto, as subsections (c), (d), (e), (f), and (g), respectively; and

(3) by inserting after subsection (a) the following new subsection:

"(b)(1) Except as provided in this section, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jursdiction of the Com-

mission under subchapter II of chapter 105 of this title as a motor common carrier of property if the Commission finds—

"(A) that the person is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this subtitle and regulations of the Commission; and

"(B) on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need;

unless the Commission finds, on the basis of evidence presented by persons objecting to the issuance of a certificate, that the transportation to be authorized by the certificate is inconsistent with the public convenience and necessity.

"(2) In making a finding under paragraph (1) of this subsection, the Commission shall consider and, to the extent applicable, make findings on at least the following:

"(A) the transportation policy of section 10101(a) of this title; and

"(B) the effect of issuance of the certificate on existing carriers, except that the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity.

"(3) The Commission may not make a finding relating to public convenience and necessity under paragraph (1) of this subsection which is based upon general findings developed in rulemaking proceedings.

"(4) The provisions of paragraph (1) of this sub-

section (other than subparagraph (A)) shall not apply to applications under this subsection for authority to provide—

"(A) transportation to any community not regularly served by a motor common carrier of property certificated under this section;

"(B) transportation services which will be a direct substitute for abandoned rail service to a community if such abandonment results in such community not having any rail service and if such application is filed within 120 days after such abandonment has been approved by the Commission;

"(C) transportation for the United States Government of property other than used household goods, hazardous or secret materials, and sensitive weapons and munitions;

"(D) transportation of shipments weighing 100 pounds or less if transported in a motor vehicle in which no one package exceeds 100 pounds; and

"(E) transportation by motor vehicle of food and other edible products (including edible by-products but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, and agricultural fertilizers if—

"(i) such transportation is provided with the owner of the motor vehicle in such vehicle, except in emergency situations; and

"(ii) after issuance of the certificate, such transportation (measured by tonnage) does not exceed, on an annual basis, the transportation provided by the motor ve-

hicle (measured by tonnage) which is exempt from the jurisdiction of the Commission under section 10526(a)(6) of this title and the owner of the motor vehicle certifies to the Commission annually that he is complying with the provisions of this clause and provides to the Commission such information and records as the Commission may require.

"(5) Notwithstanding any other provision of law, any carrier holding authority under paragraph (4)(D) of this subsection operating one or more commercial motor vehicles with a gross vehicle weight rating of 10,000 pounds or more shall be subject to commercial motor vehicle safety regulations promulgated by the Secretary of Transportation pursuant to this title with respect to its entire operations, including the operations of commercial motor vehicles with gross vehicle weight ratings less than 10,000 pounds.

"(6) The Commission shall streamline and simplify, to the maximum extent practicable, the process for issuance of certificates to which the provisions of paragraph (4)(E) of this subsection apply.

"(7) No motor common carrier of property may protest an application to provide transportation filed under this subsection unless—

"(A)(i) it possesses authority to handle, in whole or in part, the traffic for which authority is applied;

"(ii) it is willing and able to provide service that meets the reasonable needs of the shippers involved; and

"(iii) it has performed service within the scope of the application during the previous 12-

month period or has, actively in good faith, solicited service within the scope of the application during such period;

"(B) it has pending before the Commission an application filed prior in time to the application being considered for substantially the same traffic; or

"(C) the Commission grants leave to intervene upon a showing of other interests that are not contrary to the transportation policy set forth in section 10101(a) of this title.

"(8) No motor contract carrier of property may protest an application to provide transportation filed under this subsection.".

(b) Section 11145 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(c) The Commision shall streamline and simplify, to the maximum extent practicable, the reporting requirements applicable under this subchapter to motor common carriers of property with respect to transportation provided under certificates to which the provisions of section 10922(b)(4)(E) of this title apply and to motor contract carriers of property with respect to transportation provided under permits to which the provisions of section 10923(b)(5) of this title apply.".

(c)(1) Section 10762(a)(1) of title 49, United States Code, is amended by striking out the last sentence and inserting in lieu thereof the following: "A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate

to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.".

(2) Section 10762 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(g) The Commission shall streamline and simplify, to the maximum extent practicable, the filing requirements applicable under this section to motor common carriers of property with respect to transportation provided under certificates to which the provisions of section 10922(b)(4)(E) of this title apply and to motor contract carriers of property with respect to transportation provided under permits to which the provisions of section 10923(b)(5) of this title apply.".

REMOVAL OF CERTAIN RESTRICTIONS ON MOTOR CARRIER OPERATION

SEC. 6. Section 10922 of title 49, United States Code, is further amended by adding at the end thereof the following new subsections:

"(h)(1) Not later than 180 days after the date of enactment of this subsection, the Commision shall—

"(A) eliminate gateway restrictions and circuitous route limitations imposed upon motor common carriers of property; and

"(B) implement, by regulation, procedures to process expeditiously applications of individual motor carriers of property seeking removal of operating restrictions in order to—

"(i) reasonably broaden the categories of property authorized by the carrier's certificate or permit;

"(ii) authorize transportation or service to intermediate points on the carrier's routes;

"(iii) provide round-trip authority where only one-way authority exists;

"(iv) eliminate unreasonable or excessively narrow territorial limitations; or

"(v) eliminate any other unreasonable restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest.

"(2) The regulations promulgated by the Commission pursuant to paragraph (1)(B) of this subsection shall provide for final Commission action upon an application not later than 120 days after the date the application is filed with the Commission, except that in extraordinary circumstances, the Commission may extend such deadline for a period of not to exceed 90 additional days. Such regulations shall also provide for notice and the opportunity for interested parties to comment, but need not provide for oral evidentiary hearings. In granting or denying applications under paragraph (1)(B) of this subsection, the Commission shall (A) consider, among other things, the impact of the proposed restriction removal upon the consumption of energy resources, potential cost savings and improved efficiency, and the transportation policy set forth in section 10101(a) of this title, and (B) give special consideration to providing and maintaining service to small and rural communities and small shippers.

"(i) A person holding (1) a certificate issued under subsection (b) of this section to provide transportation as a motor common carrier of property, and (2) a permit issued under section 10923 of this subchapter to provide transportation as a motor contract carrier of property, may transport property under the certificate in the same motor vehicle and at the same time as property under the permit.".

MOTOR CONTRACT CARRIERS

SEC. 10. (a)(1) Section 10102(12) of title 49, United States Code, is amended to read as follows:

"(12) 'motor contract carrier' means—

"(A) a person, other than a motor common carrier, providing motor vehicle transportation of passengers for compensation under continuing agreements with a person or a limited number of persons—

"(i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or

"(ii) designed to meet the distinct needs of each such person; and

"(B) a person providing motor vehicle transportation of property for compensation under continuing agreements with one or more persons—

"(i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or

"(ii) designed to meet the distinct needs of each such person.".

(2) Section 10923(b) of title 49, United States Code, is amended by—

(A) inserting in paragraph (2) "of passengers" after "motor contract carrier"; and

(B) redesignating paragraph (3) (and any references thereto) as paragraph (7) and inserting after paragraph (2) the following new paragraphs:

"(3) In deciding whether to approve the application of a person for a permit as a motor contract carrier of property, the Commission shall consider—

"(A) the nature of the transportation proposed to be provided;

"(B) the effect that granting the permit would have on the protesting carriers if such grant would endanger or impair their operations to an extent contrary to the public interest;

"(C) the effect that denying the permit would have on the person applying for the permit, its shippers, or both; and

"(D) the changing character of the requirements of those shippers.

"(4) No motor carrier of property may protest an application to provide transportation as a motor contract carrier of property filed under this section unless—

"(A)(i) it possesses authority to handle, in whole or in part, the traffic for which authority is applied;

"(ii) it is willing and able to provide service that meets the reasonable needs of the shippers involved; and

"(iii) it has performed service within the scope of the application during the previous 12-

month period or has, actively in good faith, solicited service within the scope of the application during such period;

"(B) it has pending before the Commission an application filed prior in time to the application being considered for substantially the same traffic; or

"(C) the Commission grants leave to intervene upon a showing of other interests that are not contrary to the transportation policy set forth in section 10101(a) of this title.

"(5)(A) The provisions of paragraph (2) of subsection (a) of this section and paragraph (3) of this subsection shall not apply to applications under this section for authority to provide transportation by motor vehicle of food and other edible products (including edible byproducts but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, and agricultural fertilizers if—

"(i) such transportation is provided with the owner of the motor vehicle in such vehicle, except in emergency situations; and

"(ii) after issuance of the permit, such transportation (measured by tonnage) does not exceed, on an annual basis, the transportation provided by the motor vehicle (measured by tonnage) which is exempt from the jurisdiction of the Commission under section 10526(a)(6) of this title and the owner of the motor vehicle certifies to the Commission annually that he is complying with the provisions of this subparagraph and provides to the Commission such information and records as the Commission may require.

"(B) The Commission shall streamline and simplify, to the maximum extent practicable, the process for issuance of permits to which the provisions of subparagraph (A) of this paragraph apply.

"(6) With respect to applications of persons for permits as motor contract carriers of property, the Commission may not make a finding relating to the public interest under subsection (a)(2) of this section which is based upon general findings developed in rulemaking proceedings.".

(3) Section 10923(d) of title 49, United States Code, is amended—

(A) in the first sentence of paragraph (1) by inserting the following immediately before the period at the end thereof: ", except that in the case of a motor contract carrier of property, the Commission may not require such carrier to limit its operations to carriage for a particular industry or within a particular geographic area"; and

(B) in paragraph (2) by striking "including each person or number or class of persons" and substituting "including each person or class of persons (and, in the case of a motor contract carrier of passengers, the number of persons)".

(b) Section 10930(a) of title 49, United States Code, is amended—

(1) in paragraph (1) by striking "both a certificate of a motor common carrier and a permit of a motor contract carrier issued under this subchapter, or"; and

(2) by striking out paragraph (2) and inserting in lieu thereof the following:

"(2) if a person controls, is controlled by, or is under common control with, another person,

one of them may not hold a certificate of a water common carrier, while the other holds a permit of a water contract carrier, to transport property over the same route or in the same area.".

(c) Section 10749 of title 49, United States Code, is amended—

(1) in subsection (a) by inserting ", or a motor contract carrier of property," after "carrier"; and

(2) in subsection (b)(1) by inserting ", or motor contract carrier of property," after "water common carrier".

(d) Section 10766(b) of title 49, United States Code, is amended—

(1) by inserting ", and motor contract carriers of property," after "carriers" in the first sentence;

(2) by inserting "or the motor contract carrier of property" after "carrier" in the third sentence; and

(3) by striking the fifth sentence.

(e) Section 10925 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(e)(1) On application of a motor contract carrier of property who holds a permit issued under section 10923 of this title, or on complaint of a competing motor common carrier of property who holds a certificate under section 10922(b) of this title, or on its own initiative, if the Commission, after notice and an opportunity for a proceeding, determines that the operations under the permit or any part thereof—

"(A) do not conform with the operations of a motor contract carrier of property; and

"(B) are those of a motor common carrier of property;

the Commission may amend or revoke such permit or part thereof to conform the operations under such permit or part thereof to the operations of a motor contract carrier of property.

"(2) The Commission may issue in place of any permit or part thereof revoked under this subsection a certificate under section 10922(b) of this title which authorizes the holder of such certificate to provide transportation as a motor common carrier of property of the same property between the same points or within the same territory as authorized in the permit or part thereof.".

Pertinent provisions of
Title 49 with the Motor Carrier Act
of 1980 incorporated—

§ 10101. Transportation policy

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—

(1) to recognize and preserve the inherent advantage of each mode of transportation;

(2) to promote safe, adequate, economical, and efficient transportation;

(3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;

(5) to cooperate with each State and the officials of each State on transportation matters;

(6) to encourage fair wages and working conditions in the transportation industry; and

(7) with respect to transportation of property by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers; (F) improve and maintain a sound, safe, and competitive privately-owned motor carrier system; (G) promote greater participation by minorities in the motor carrier system; and (H) promote intermodal transportation.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

§ 10922. Certificates of motor and water common carriers

(a) Except as provided in this section and section 10930(a) of this title, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title as a motor common carrier of passengers or water common carrier, respectively, if the Commission finds that—

(1) the person is fit, willing, and able—

(A) to provide the transportation to be authorized by the certificate; and

(B) to comply with this subtitle and regulations of the Commission; and

(2) the transportation to be provided under the certificate is or will be required by the present or future public convenience and necessity.

(b)(1) Except as provided in this section, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title as a motor common carrier of property if the Commission finds—

(A) that the person is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this subtitle and regulations of the Commission; and

(B) on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need;

unless the Commission finds, on the basis of evidence presented by persons objecting to the issuance of a certificate, that the transportation to be authorized by the certificate is inconsistent with the public convenience and necessity.

(2) In making a finding under paragraph (1) of this subsection, the Commission shall consider and, to the extent applicable, make findings on at least the following:

(A) the transportation policy of section 10101 (a) of this title; and

(B) the effect of issuance of the certificate on existing carriers, except that the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity.

(3) The Commission may not make a finding relating to public convenience and necessity under paragraph (1) of this subsection which is based upon general findings developed in rulemaking proceedings.

(4) The provisions of paragraph (1) of this subsection (other than subparagraph (A)) shall not apply to applications under this subsection for authority to provide—

(A) transportation to any community not regularly served by a motor common carrier of property certificated under this section;

(B) transportation services which will be a direct substitute for abandoned rail service to a community if such abandonment results in such community not having any rail service and if such application is filed within 120 days after such abandonment has been approved by the Commission;

(C) transportation for the United States Government of property other than used household goods, hazardous or secret materials, and sensitive weapons and munitions;

(D) transportation of shipments weighing 100 pounds or less if transported in a motor vehicle in which no one package exceeds 100 pounds; and

(E) transportation by motor vehicle of food and other edible products (including edible by-products but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, and agricultural fertilizers if—

(i) such transportation is provided with the owner of the motor vehicle in such vehicle, except in emergency situations; and

(ii) after issuance of the certificate, such transportation (measured by tonnage) does not exceed, on an annual basis, the transportation provided by the motor vehicle (measured by tonnage) which is exempt from the jurisdiction of the Commission under section 10526(a)(6) of this title and the owner of the motor vehicle certifies to the Commission annually that he is complying with the provisions of this clause and provides to the Commission such information and records as the Commission may require.

(5) Notwithstanding any other provision of law, any carrier holding authority under paragraph (4)(D) of this subsection operating one or more commercial motor vehicles with a gross vehicle weight rating of 10,000 pounds or more shall be subject to

commercial motor vehicle safety regulations promulgated by the Secretary of Transportation pursuant to this title with respect to its entire operations, including the operations of commercial motor vehicles with gross vehicle weight ratings less than 10,000 pounds.

(6) The Commission shall streamline and simplify, to the maximum extent practicable, the process for issuance of certificates to which the provisions of paragraph (4)(E) of this subsection apply.

(7) No motor common carrier of property may protest an application to provide transportation filed under this subsection unless—

(A)(i) it possesses authority to handle, in whole or in part, the traffic for which authority is applied;

(ii) it is willing and able to provide service that meets the reasonable needs of the shippers involved; and

(iii) it has performed service within the scope of the application during the previous 12-month period or has, actively in good faith, solicited service within the scope of the application during such period;

(B) it has pending before the Commission an application filed prior in time to the application being considered for substantially the same traffic; or

(C) the Commission grants leave to intervene upon a showing of other interests that are not contrary to the transportation policy set forth in section 10101(a) of this title.

(8) No motor contract carrier of property may protest an application to provide transportation filed under this subsection.

(9) Notwithstanding the provisions of paragraph (4) of this subsection, the provisions of paragraph (1) of this subsection (other than subparagraph (A)) shall not apply to applications under this subsection for authority to provide transportation for the United States Government of used household goods which transportation is incidental to a pack and crate service on behalf of the Department of Defense.

(c) A person must file an application with the Commission for a certificate to provide transportation as a motor common carrier or water common carrier. The Commission may approve any part of the application or deny the application. The application must—

(1) be under oath;

(2) contain information required by Commission regulations; and

(3) be served on persons designated by the Commission.

(d)(1) Subject to section 10927(a) of this title, each certificate issued to a person to provide transportation as a motor common carrier shall specify—

(A) the transportation to be provided by the carrier;

(B) any of the regular routes over which, any of the places between which, and off-route places at which, the carrier may provide transportation; and

(C) if transportation is not over regular routes or between specified places, the area in which the carrier may provide transportation.

(2) Under regulations of the Commision, a motor common carrier may occasionally deviate from the

regular routes, or the places specified in the certificate, or both.

(3) If a motor common carrier transports passengers, the Commission may authorize transportation of the passengers only over a regular route and between specified places, except to the extent the carrier is authorized to provide special or charter transportation.

(4) A certificate of a motor common carrier to transport passengers may include authority to transport—

(A) newspapers, baggage of passengers, express, or mail in the same motor vehicle with the passengers; and

(B) baggage of passengers in a separate motor vehicle.

(e) Each certificate issued to a person to provide transportation as a water common carrier shall specify each route over which, and each port between which, the carrier may provide transportation.

(f)(1) A motor common carrier may provide transportation under a certificate only if the carrier complies with conditions the Commision finds are required by public convenience and necessity, including conditions—

(A) on extending routes of the carrier; and

(B) to carry out requirements established by the Commission under this subtitle.

(2) The Commission may prescribe necessary conditions under which a water common carrier provides transportation, including conditions on extending routes of the carrier.

(3) The Commission may prescribe conditions when the certificate is issued and at any time there-

after. The Commission may not prescribe a condition preventing—

(A) a motor common carrier or water common carrier from adding to its equipment and facilities or its transportation within the scope of the certificate to satisfy business development and public demand; or

(B) a water common carrier, if the carrier has authority to provide transportation over completed parts of a waterway project authorized under law, from extending its transportation over the uncompleted parts of the project when opened for navigation to satisfy business development and public demand.

(g) A certificate issued under this section does not confer a proprietary or exclusive right to use the public highways or public waterways.

(h)(1) Not later than 180 days after the date of enactment of this subsection, the Commission shall—

(A) eliminate gateway restrictions and circuitous route limitations imposed upon motor common carriers of property; and

(B) implement, by regulation, procedures to process expeditiously applications of individual motor carriers of property seeking removal of operating restrictions in order to—

(i) reasonably broaden the categories of property authorized by the carrier's certificate or permit;

(ii) authorize transportation or service to intermediate points on the carrier's routes;

(iii) provide round-trip authority where only one-way authority exists;

(iv) eliminate unreasonable or excessively narrow territorial limitations; or

(v) eliminate any other unreasonable restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest.

(2) The regulations promulgated by the Commission pursuant to paragraph (1)(B) of this subsection shall provide for final Commission action upon an application not later than 120 days after the date the application is filed with the Commission, except that in extraordinary circumstances, the Commission may extend such deadline for a period of not to exceed 90 additional days. Such regulations shall also provide for notice and the opportunity for interested parties to comment, but need not provide for oral evidentiary hearings. In granting or denying applications under paragraph (1)(B) of this subsection, the Commission shall (A) consider, among other things, the impact of the proposed restriction removal upon the consumption of energy resources, potential cost savings and improved efficiency, and the transportation policy set forth in section 10101(a) of this title, and (B) give special consideration to providing and maintaining service to small and rural communities and small shippers.

(i) A person holding (1) a certificate issued under subsection (b) of this section to provide transportation as a motor common carrier of property, and (2) a permit issued under section 10923 of this subchapter[1] to provide transportation as a motor contract carrier of property, may transport property

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[1] So in original. Probably should be "title".

under the certificate in the same motor vehicle and at the same time as property under the permit.

(j) A motor common carrier of property may deliver to or receive from a rail carrier a trailer moving in trailer-on-flat-car service at any point on the route of the rail carrier if the motor carrier is authorized to serve the origin and destination points of the traffic.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1409; Pub.L. 96-296, §§ 5(a), 6, 34(a), July 1, 1980, 94 Stat. 794, 796, 825; Pub.L. 96-454, § 10(a), Oct. 15, 1980, 94 Stat. 2021.

§ 10923. Permits of motor and water contract carriers and freight forwarders

(a) Except as provided in this section and section 10930 of this title, the Interstate Commerce Commission shall issue a permit to a person authorizing the person to provide transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title as a motor contract carrier or water contract carrier, respectively, or to provide service subject to that jurisdiction under subchapter IV of chapter 105 as a freight forwarder, if the Commission finds that—

(1) the person is fit, willing, and able—

(A) to provide the transportation or service to be authorized by the permit; and to be authorized by the permit; and

(B) to comply with this subtitle and regulations of the Commission; and

(2) the transportation or service to be provided under the permit is or will be consistent with the public interest and the transportation policy of section 10101 of this title.

(b) (1) A person must file an application with the Commission for a permit to provide transportation as a contract carrier or to provide service as a freight forwarder. The Commission may approve any part of the application or deny the application. The application must—

(A) be under oath;

(B) contain information required by Commission regulations; and

(C) be served on persons designated by the Commission.

(2) In deciding whether to approve the application of a person for a permit as a motor contract carrier of passengers, the Commission shall consider—

(A) the number of shippers to be served by the carrier;

(B) the nature of the transportation proposed to be provided;

(C) the effect that granting the permit would have on the transportation of carriers protesting the granting of the permit;

(D) the effect that denying the permit would have on the person applying for the permit, its shippers, or both; and

(E) the changing character of the requirements of those shippers.

(3) In deciding whether to approve the application of a person for a permit as a motor contract carrier of property, the Commission shall consider—

(A) the nature of the transportation proposed to be provided;

(B) the effect that granting the permit would have on the protesting carriers if such grant

would endanger or impair their operations to an extent contrary to the public interest;

(C) the effect that denying the permit would have on the person applying for the permit, its shippers, or both; and

(D) the changing character of the requirements of those shippers.

(4) No motor carrier of property may protest an application to provide transportation as a motor contract carrier of property filed under this section unless—

(A)(i) it possesses authority to handle, in whole or in part, the traffic for which authority is applied;

(ii) it is willing and able to provide service that meets the reasonable needs of the shippers involved; and

(iii) it has performed service within the scope of the application during the previous 12-month period or has, actively in good faith, solicited service within the scope of the application during such period;

(B) it has pending before the Commission an application filed prior in time to the application being considered for substantially the same traffic; or

(C) the Commission grants leave to intervene upon a showing of other interests that are not contrary to the transportation policy set forth in section 10101(a) of this title.

(5)(A) The provisions of paragraph (2) of subsection (a) of this section and paragraph (3) of this subsection shall not apply to applications under this section for authority to provide transportation by

motor vehicle of food and other edible products (including edible byproducts but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, and agricultural fertilizers if—

(i) such transportation is provided with the owner of the motor vehicle in such vehicle, except in emergency situations; and

(ii) after issuance of the permit, such transportation (measured by tonnage) does not exceed, on an annual basis, the transportation provided by the motor vehicle (measured by tonnage) which is exempt from the jurisdiction of the Commission under section 10526(a)(6) of this title and the owner of the motor vehicle certifies to the Commission annually that he is complying with the provisions of this subparagraph and provides to the Commission such information and records as the Commission may require.

(B) The Commission shall streamline and simplify, to the maximum extent practicable, the process for issuance of permits to which the provisions of subparagraph (A) of this paragraph apply.

(6) With respect to applications of persons for permits as motor contract carriers of property, the Commission may not make a finding relating to the public interest under subsection (a)(2) of this section which is based upon general findings developed in rulemaking proceedings.

(7) The Commission may not deny any part of an application for a freight forwarder permit filed by a corporation controlled by, or under common control with—

(A) a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I, II, or III of chapter 105 of this title, because of the relationship between the corporation and that carrier; and

(B) a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 only because the service to be provided by the corporation will compete with service provided by another freight forwarder subject to subchapter IV of that chapter.

(c) Each permit issued to a person—

(1) to provide transportation as a motor contract carrier is subject to section 10927(a) of this title and shall specify the transportation to be provided by the carrier;

(2) to provide transportation as a water contract carrier shall specify the transportation to be provided by the carrier; and

(3) to provide service as a freight forwarder shall specify the nature or general description about which the service is to be provided, the area in which, and the areas between which, the service may be provided by the freight forwarder

(d)(1) The Commission may prescribe necessary conditions under which a contract carrier or freight forwarder provides transportation or service, except that in the case of a motor contract carrier of property, the Commission may not require such carrier to limit its operations to carriage for a particular industry or within a particular geographic area. The Commission may prescribe the conditions when the permit is issued and at any time thereafter.

(2) The permit for a motor contract carrier shall specify necessary conditions, including each person or class of persons (and, in the case of a motor contract carrier of passengers, the number of persons) for which the carrier may provide transportation—

(A) to ensure that the carrier provides transportation as a motor contract carrier and within the scope of the permit; and

(B) to carry out requirements established by the Commission under this subtitle.

(3) Subject to the permit and its conditions, a motor contract carrier may substitute or add to its equipment and facilities as requests for its transportation develop. The Commission may not prescribe a condition preventing—

(A) a water contract carrier from substituting or adding contracts within the scope of the permit to satisfy the requirements of business development and public demand; and

(B) a water contract carrier or freight forwarder from adding to its equipment and facilities, and transportation or service, as the case may be, within the scope of the permit to satisfy the requirements of business development and public demand.

(e) A motor contract carrier of property may deliver to or receive from a rail carrier a trailer moving in trailer-on-flat-car service at any point on the route of the rail carrier if the motor carrier is authorized to serve the origin and destination points of the traffic.

APPENDIX L

[Ex Parte No. 55 (Sub-No. 43A);
Ex Parte No. MC-142 (Sub-No. 1)]

Acceptable Forms of Requests for Operating Authority (Motor Carriers and Brokers of Property) and Removal of Restrictions From Authorities of Motor Carriers of Property

AGENCY: Interstate Commerce Commission.

ACTION: Notice of invalidation of certain rules and interim procedures required by court action pending appeal.

SUMMARY: *American Trucking Ass'ns.* v. *ICC*, 659 F.2d 452 (5th Cir. 1981) held that the guidelines and policy statements promulgated in Ex Parte No. 55 (Sub-No. 43A), *Acceptable Forms of Request for Operating Authority (Motor Carriers and Brokers of Property)*, 364 I.C.C. 432, 45 FR 86798, December 31, 1980, and Ex Parte No. MC-142 (Sub-No. 1), *Removal of Restrictions from Authorities of Motor Carriers of Property*, 45 FR 86747, December 31, 1980, are more appropriately to be considered rules, and that certain parts of those rules are invalid. On February 25, 1982 the court entered a writ of mandamus requiring the Commission to comply with its prior decision as clarified by its decision accompanying its order of mandamus in deciding cases commencing March 8, 1982. Although the Commission is seeking a writ of certiorari from the Supreme Court with respect to the mandamus order, it will comply with the court's order unless and until the Commission is relieved of the obligation of doing so.

FOR FURTHER INFORMATION CONTACT:

Charles L. Renninger (unopposed cases) 202-275-6001; Andrew L. Lyon (opposed cases) 202-275-7805; and Robin Williams (restriction removal cases) 202-275-1871.

SUPPLEMENTARY INFORMATION: The purpose of this notice is to comply with a writ of mandamus entered February 25, 1982, in *ATA* v. *ICC*, *supra*, by announcing that the Commission will comply with the Court's order in deciding cases commencing with March 8, 1982, and by announcing to the public the following with respect to the guidelines, policy statements and rules promulgated by the Commission in these proceedings:

1. The guidelines and policy statements in Ex Parte No. 55 (Sub-No. 43A), *supra*, and Ex Parte No. MC-142 (Sub-No. 1), *supra*, have been found by the United States Court of Appeals for the Fifth Circuit to be rules.

(2) Certain parts of the policy statement in Ex Parte No. 55 (Sub-No. 43A) have been declared by that court to be invalid. The invalid parts are those affected by the following statements of the court:

(a) The ICC shall permit applicants to apply for any reasonably broad commodity authority and it shall require a showing that the applicant is fit, willing, and able to carry the commodities for which authority is sought. The Commission may not assume that an applicant that is fit, willing, and able to carry one commodity in an STCC classification is fit, willing, and able to carry all commodities in that classification. Slip opinion p. 11-12.

(b) Bulk service authority shall not be extended to carriers who cannot demonstrate that they are fit,

willing, and able to provide the transportation to be authorized by the certificate. Slip opinion p. 12.

(c) Authority to transport household goods must be excepted from general commodities authority unless the applicant demonstrates fitness, willingness and ability to render that service. Slip opinion p. 12.

(d) Authority for service to Alaska and Hawaii shall not be granted based only on a need for service in the other forty-eight states. The Commission may, upon remand, however, consider authorizing those forty-eight state carriers who are found to be fit, willing, and able to provide services to Alaska and Hawaii, to render that service upon representative showing of need. Slip opinion p. 12.

(3) Certain parts of the guidelines in Ex Parte No. 142 (Sub-No. 1), *supra*, have been declared to be invalid. The invalid parts are those affected by the following statements of the court.

(a) In every proceeding to "broaden the categories of property authorized" by existing certificates (49 U.S.C.A. § 10922(h)(1)), the Commission shall follow our earlier opinion that:

> The carrier must be permitted, both by the Commission's express statement and actual agency practice, to seek some other commodity classification if it can show that use of the tripartite Commission standard would require the transportation of commodities unrelated to those previously authorized or would require the institution of a different type of service, and that the carrier is not fit or is unwilling or is unable to provide the service.

659 F.2d at 464-65 [footnote omitted]. Slip opinion p. 9.

(b) In every restriction removal proceeding the Commission must provide "some opportunity for opposition to [the] application to be voiced." 659 F.2d at 465. Slip opinion p. 9.

(c) In every proceeding by which authority to carry general commodities is sought, the ICC is ordered not to grant bulk commodities authority to the applicant without requiring some showing that the applicant is fit, willing, and able to provide the bulk commodity transportation sought. Slip opinion p. 10.

(d) In every proceeding involving a general commodities carrier, the ICC shall not permit the "general commodities carrier [to] eliminate the restriction against household goods without demonstrating more than its general commodities certificate." 659 F.2d 467-68. The ICC shall further require in every such proceeding some showing that the carrier is fit, willing, and able to carry household goods, in accordance with the other provisions of the Motor Carrier Act. Slip opinion p. 10.

The ICC states that it has not required applicants to show that they possess specialized equipment and that it has drawn inferences of fitness from past successful operations. Nothing in this mandate requires the ICC to depart from this practice. Slip opinion p. 10, n. 8.

(4) Applicants filing applications for restriction removal, or new authority after the date of publication of this notice are advised that they may seek any reasonably broad commodity description and that they should submit evidence and argument at the time of filing these applications sufficient to enable the Commission to render decisions in compliance with the requirements of the court's order of mandamus set forth above.

(5) Applications pending as of March 8, 1982, will be processed in compliance with the requirements of the court's order of mandamus set forth above. When appropriate, the Commission may require reopening of the record in certain proceedings to elicit evidence and argument sufficient to enable it to render decisions which comply with these requirements.

Decided: March 19, 1982.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Gresham, Clapp, and Sterrett. Commissioner Clapp did not participate.

Agatha L. Mergenovich,
Secretary.

[FR Doc. 82-8600 Filed 3-30-82; 8:45 am]

BILLING CODE: 7035-01-M

APPENDIX M

SUPREME COURT OF THE UNITED STATES

No. A-976

UNITED STATES and
INTERSTATE COMMERCE COMMISSION, PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 9, 1982.

/s/ Byron R. White
Associate Justice of the
Supreme Court of the
United States

Dated this 17th day of May, 1982.

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AUG 16 1982
ALEXANDER L. STEVAS.

No. 82-86

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION,
Petitioner

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-86

INTERSTATE COMMERCE COMMISSION,
Petitioner

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

This case involves an appeal by the Interstate Commerce Commission of various decisions of the court of appeals: (1) holding that policy statements purporting to implement provisions of the Motor Carrier Act of 1980 (the 1980 Act)[1] were in fact rules which in large measure exceeded the bounds of the Commission's statutory authority; and (2) issuing a writ of mandamus enforcing its prior opinion. The court's initial decision was rendered on October 1, 1981 and subsequently corrected on October 23, 1981. In January 1982, the Commission voted not to seek further review of the court's decision.

Following the Commission's apparent refusal to comply with the court's remand, petitioners below in January 1982 filed a petition for enforcement of the court's

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[1] Pub. L. No. 96-296, 94 Stat. 793.

previously issued mandate. The Commission vigorously opposed this effort indicating that it objected to any relief.[2] By decision issued February 25, 1982, the court of appeals granted petitioners below prospective relief in the form of a writ of mandamus (Pet. App. 63a-81a). Subsequently, the court refused to inject itself into the Commission's disposition of past individual licensing proceedings after the October decision (Pet. App. 89a-98a).[3]

The writ became effective March 8, 1982.[4] Thereafter, the Commission sought a stay of the writ pending the filing of a petition for a writ of certiorari. The stay was denied by the court of appeals (Pet. App. 83a-84a). After noting that the Commission had failed to seek rehearing *en banc* or a writ of certiorari, the court concluded that, "[t]he mandamus order merely enforces the prior opinion and in no way alters that opinion, which has now become final" (Pet. App. 85a-86a). In denying the stay, the court recognized that the only remaining issue "is the propriety of the mandamus order as a method of enforcing that [October] opinion" (*id.* at 86a).[5]

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[2] Contrary to the Commission's assertion (Pet. 16), the agency, not petitioners below, urged that the only form relief could take was mandamus. The Commission, however, disputed that the court had any authority to act. The United States, through the Department of Justice which had previously supported the Commission, disagreed. The Department recognized the power of the court of appeals to act in aid of its October 1981 judgment, even including the use of a writ of mandamus, but suggested that more moderate relief would be sufficient if the court determined that enforcement was necessary.

[3] This order, issued on March 30, 1982, has not been appealed.

[4] Contrary to the Commission's statement (Pet. 1), no party sought rehearing of the writ of mandamus.

[5] On March 29, 1982, Mr. Justice White granted the Commission's request for a stay of the writ of mandamus pending review (Pet. App. 99a-100a). Again the Department of Justice disassociated itself from the Commission and supported a stay only as to a single paragraph of the writ.

As reflected by its petition for a writ of certiorari, the Commission seeks to challenge the court of appeals' October decision as well as the court's granting of the writ of mandamus. Since the Commission failed to file its petition seeking the issuance of a writ in a timely fashion, this Court is without jurisdiction to review the October opinion. Insofar as the issuance of the writ of mandamus is concerned, the appeal involves only the application of settled legal principles to the facts of this particular case. It presents no issue warranting plenary consideration by this Court.

ARGUMENT

1. The time for filing a petition seeking review of the court of appeals' October opinion expired 90 days after entry of the judgment. 28 U.S.C. 2101(c). The Commission did not seek an extension of time. Inasmuch as this provision is jurisdictional, *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942), no review may be had.

The Commission itself recognized this jurisdictional bar in voting on whether to seek further review of the October decision. The votes of the Commissioners, reflected in the January 11, 1982 clearance by the Commission's Secretary, reveal the Commission's awareness that no further action could be taken with respect to the October decision (Resp. App. A, 1a-2a). No persuasive argument has been advanced that the Commission failed to appreciate the consequences of these votes.[6]

Nevertheless, in an effort to restore jurisdiction, the Commission disingenuously suggests that the writ of mandamus modified the substance of the court of appeals' earlier decision (Pet. 2, 20-21). This suggestion is without merit inasmuch as the lower court's decision,

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[6] The Commission concedes (Pet. 16, n.15) that "no court action could be taken" after the January votes.

issued in response to the petition to compel enforcement of the court's mandate, in no way disturbed or revised the substance of determinations which were settled by the October decision.[7] Moreover, issuance of the writ did not resolve any genuine ambiguities.

The court of appeals itself has stated that it was not making any substantive change to the prior decision in the writ (Pet. App. 85a-86a). Nevertheless, without any supporting references, the Commission erroneously asserts that the writ made four "changes" to the October opinion (Pet. 21-22). However, all four holdings were clearly set forth in the October opinion and the writ simply reiterated them.

As for the Commission's first point, the lower court did not make any change regarding what commodity descriptions are covered by its October opinion. In both decisions the court focused upon the transportation of household goods and bulk commodities. The writ repeats the October holding that "general commodities" authority may not automatically include those services in the absence of a statutorily-required showing that every applicant is fit, willing, and able to provide the service to be authorized (*compare* Pet. App. 32a-33a and 50a-51a with 75a-77a).[8]

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[7] As reflected by the court's opinion of February 25, 1982, (Pet. App. 66a, n.1), "[t]he time for filing an application for rehearing before the Fifth Circuit or an application for certiorari with the United States Supreme Court has expired."

[8] Contrary to the Commission's further contention, household goods and bulk commodities were not "singled out for special treatment" (Pet. 21). The court's fundamental holding was that, regardless of what kind of authority is at issue, "the statute did not dispense with the primary requirement that every carrier be 'fit, willing, and able to provide the transportation to be authorized by the certificate' " (Pet. App. 30a). *See also* Pet. App. 41a-42a. This most basic proposition of the October opinion has been followed by another court of appeals in *Ritter Transportation, Inc. v. ICC*, No. 81-2116 (D.C. Cir., decision dated July 27, 1982), citing *American Trucking Associations, Inc. v. ICC*, 659 F.2d 452, 464.

Having found that the Commission's purported policies under review were binding rules which largely exceeded its statutory mandate, the court remanded the case simply "to permit the Commission to enact rules that do not exceed the statutory bounds" (Pet. App. 10a). The writ made no change on this point (*compare* Pet. App. 72a-73a and 76a). Contrary to the Commission's conjecture (Pet. 18, 21, 25), the court of appeals never suggested that the agency may not proceed, in other circumstances, by policy statement or adjudication to establish motor carrier licensing practices. Rather, the lower court has only held that, in this proceeding where the Commission had elected to proceed by rules (Pet. App. 71a), the agency was required to bring those rules into compliance with the October decision in accordance with the Administrative Procedure Act (*id.* at 79a).[9]

The Commission also claims (Pet. 21-22) that the lower court in the writ modified its earlier decision to require applicants in restriction removal proceedings to demonstrate fitness, willingness and ability. This claim is totally unsupportable. The court made that exact finding in its October opinion when it held for the first time that the restriction removal provision of the statute "does not dispense with the primary requirement that every [applicant] demonstrate it is fit, willing and able to provide the service to be authorized" (Pet. App. 30a).[10]

The last "change" referenced by the Commission (Pet. 22) is likewise wide of the mark. As reflected in its writ of mandamus, the court agreed with the Commission that the Commission need not require a specific

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[9] Counsel's suggestion (Pet. 18) that the Commission had previously elected to proceed by "adjudication" is flatly contradicted by the continued existence to this day of the invalidated rules which have never been rescinded. The Commission may not have it both ways.

[10] The *Ritter* decision, *supra*, n.8, also confirms this fact.

showing of equipment but rather could continue to allow applicants to show fitness through evidence of successful past operations (Pet. App. 75a-76a n. 7). The court's confirmation of the appropriateness of the Commission's past practices does not constitute a change in substance from the October opinion.

In short, the lower court did no more than repeat or restate the pertinent holdings of its earlier opinion. Mere restatement of the court's prior judgment which does not change matters of substance or resolve a genuine ambiguity does not renew the time within which review may be sought.[11] *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952). As a result, the Commission's filing is untimely insofar as it seeks to have this Court review the merits of the October decision of the court of appeals.

2. Respondents submit that the only issue properly before this Court is the propriety of the writ of mandamus as a means of enforcing the court of appeals' previous October judgment and mandate. There is, however, no occasion for further review of this issue.

There is no question but that a court of appeals has the power or authority to act to protect and enforce its prior mandate. *United States* v. *New York Telephone Co.*, 434 U.S. 159, 172 (1977); *Dugas* v. *American Surety Co.*, 300 U.S. 414, 428 (1937); *United States ex rel. Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166, 187,

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[11] Significantly, the Solicitor General has indicated to the Commission that, "No doubt the current Commission majority regrets that the agency did not seek further review of ATA, but the time for review of that decision passed months ago." Quoted by Commission Vice Chairman Gilliam, in a formal vote dated March 18, 1982 (Resp. App. B, 3a). The original memorandum was written by Abbott Lipsky, Jr., Deputy Assistant Attorney General, Antitrust Division, to the Solicitor General on March 15, 1982, well *after* issuance of the writ by the court of appeals.

194 (1867).[12] Indeed, the Commission has sought enforcement of a lower court judgment when it believed such an order was necessary to "effectuate lawful orders and judgments and to prevent them from being thwarted and interfered with by force, guile, or otherwise * * *." *See Mississippi Valley Barge Line Co.* v. *United States*, 273 F. Supp. 1, 6 (E.D. Mo. 1967), *aff'd*, 389 U.S. 579 (1968), *reh'g denied*, 390 U.S. 975 (1970).

The Commission's argument (Pet. 27) that the court of appeals failed to find that the agency was in fact not complying with the court's mandate is specious. In issuing the writ, the court acted only after affirmatively finding:

> [T]hree months after the rendition of our prior opinion, the ICC has not fully complied with it. Yet it is apparently continuing to act in many cases without applying the principles that are exacted by the Motor Carrier Act, as interpreted by our prior opinion. Litigation in scores of cases is not adequate remedy for an agency's failure to carry out its statutory duties. Therefore, there is no adequate alternative remedy. *Allied Chemical Corp.* v. *Daiflon*, 449 U.S. 33, 101 S. Ct. 188, 190, 66 L. Ed. 2d 193 (1980). (Pet. App. 71a).[13]

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[12] The court of appeals relied upon numerous decisions by this Court and several circuit courts in concluding it needed to act (Pet. App. 69a-70a). As the court noted:

> Indeed, the ICC concedes that mandamus is the appropriate remedy to enforce the judgment of an appellate court, itself correctly citing, *inter alia*, *Will v. United States*, 389 U.S. 90, 95, 88 S. Ct. 269, 273, 19 L. Ed. 2d 305, 310 (1967), and the cases cited *supra*. It contests only the adequacy of the showing made to warrant issuance of the writ. (*Id.* at 70a).

[13] The Commission's assertion (Pet. 27), that the court of appeals found only that the agency "appeared" that it might be violating the mandate, is a play on words. Petitioners below argued, and

The Commission further contends that the writ of mandamus impermissibly intrudes on its discretion in future licensing proceedings (Pet. 28-29) and on its choice of how to proceed on remand (*id.* at 29-30). These allegations are groundless. The writ of mandamus runs only to the most basic of ministerial duties—compelling positive compliance with the court's prior judgment and mandate interpreting the governing statute.[14] Because the Commission has no discretion to ignore the October opinion which it failed to appeal, there can be no improper intrusion caused by the writ which merely enforces that opinion.

Nor does the writ of mandamus improperly interfere with the Commission's discretion on remand. The writ was issued to command the Commission to take action on invalidated "policies" never rescinded, which the court found to be beyond the Commission's statutory mandate (Pet. App. 10a, 26a-29a, 47a-49a). The court was concerned that the Commission's failure to "effectuate those parts of our opinion requiring changes in its published rules" would create substantial confusion for the public as to what rules should be followed (Pet. App. 71a). Consequently, the court evaluated the Commission's action and correctly found:

> Because the ICC has promulgated rules never rescinded, it has obviously chosen not to interpret the requirements of the Motor Carrier Act on a case by case basis. (*Ibid.*).

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the court of appeals agreed, that the Commission's violations of the previous judgment and mandate were "apparent" or obvious on their face (*see* Pet. App. 71a). Ironically, the Commission used the word "apparent" to mean "obvious" in its Petition (Pet. 5).

[14] The Commission's related contention (Pet. 29) that the writ is inconsistent with the court's subsequent denial of other relief is without merit. The court consistently refused to interfere in individual licensing adjudications, either on a prospective *or* a retroactive basis (*see* Pet. App. 98a). Its distinct findings as to each request for enforcement were based on a consistent and proper reading of the case law.

Thus, in directing the Commission to proceed by rulemaking, the court did no more than tailor its remedy to the course upon which the Commission had chosen to embark.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDICES

APPENDIX A

OFFICE OF THE SECRETARY

Clearance Unit

No. 82-5

Re: American Trucking Associations, Inc., et al. v. Interstate Commerce Commission and United States of America, U.S.C.A., 5th Cir., Unit A, No. 81-4026

Ex Parte No. 55 (Sub-No. 43A), Acceptable Forms of Requests for Operating Authority (Motor Carriers and Brokers of Property)

Ex Parte No. MC-142 (Sub-No. 1), Removal of Restrictions from Authorities of Motor Carriers of Property

Prior G.C. Memo Nos. 81-357, 81-366, 81-368, 81-383, 81-412, 81-434, 81-440, 81-454 and 82-4

(G.C. File No. 4367)

January 11, 1982

MEMORANDUM TO
ACTING GENERAL COUNSEL RUSH:

On *January 8, 1982*, the Commission failed to reach a majority concerning the disposition of your recommendation not to seek an extension of time for filing a petition for a writ of certiorari circulated January 7, 1982, therefore an extension may not be sought.

Chairman Taylor and Commissioner Clapp would not seek an extension of time for filing a writ of certiorari.

Vice Chairman Gilliam would seek an extension of time of 30 to 60 days for filing a writ of certiorari.

Commissioner Gresham would seek from the Supreme Court an extension of time in which the Commission may file a request for certiorari.

A copy of each vote is attached.

KATHY LINK

cc: All Commissioners
Secretaary Mergenovich
Director Hardy (with copy of votes)
Director Hatton
Director Dahlgren

APPENDIX B

OFFICE OF VICE CHAIRMAN GILLIAM

G.C. No. 82-98

Re: American Trucking Associations, Inc., et al. v. Interstate Commerce Commission and United States of America, U.S.C.A., 5th Cir., Unit A, No. 81-4026

Ex Parte No. 55 (Sub-No. 43A), Acceptable Forms of Requests for Operating Authority (Motor Carriers and Brokers of Property)

Ex Parte No. MC-142 (Sub-No. 1), Removal of Restrictions from Authorities of Motor Carriers of Property

March 18, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote to approve the draft notice submitted by the Office of Proceedings. However, I feel that the General Counsel, in order to enlist the support of the Solicitor-General's Office, recommends that the Commission forego several lines of attack against the 5th Circuit's mandamus order.

While I realize that aid of the Solicitor-General is virtually indispensible to an agency seeking to litigate before the Supreme Court the Commission should be apprised of the Hobbesian choice before it. This choice is best illustrated by the memorandum prepared for the Solicitor-General by the Antitrust Division. As the Division states: "No doubt the current Commission majority regrets that the agency did not seek further review of ATA, but the time for review of that decision passed months ago."

/s/ R. E. G.
GILLIAM

cc: All Commissioners
Clearance Unit
Office of the General Counsel

Office - Supreme Court, U.S.
FILED
SEP 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-86

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
RESPONDENTS

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-86

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., RESPONDENTS

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

In support of their argument that this Court ought not review the October 1982 decision of the United States Court of Appeals for the Fifth Circuit, *American Trucking Associations, Inc.* v. *ICC*, 659 F. 2d 452 (5th Cir. 1981), respondents assert that the meaning of the October mandate was always clear to the parties (or at least to respondents) and that the court of appeals' February 1982 mandamus order, *American Trucking Associations, Inc.* v. *ICC*, 669 F. 2d 957 (5th Cir. 1982), was issued for the sole purpose of assuring compliance with the October mandate and not to resolve ambiguities inherent in that October mandate. This is a serious misstatement.

1. As discussed in the Commission's petition for certiorari, pp. 14-22, after the court of appeals issued its October decision and mandate, *all* of the parties were at odds over the meaning of the court's action. Contrary to respondents' assertions, they were, in fact, *not* always

fully cognizant of and confident in the meaning of the October decision and mandate. Indeed, their pleadings to the Fifth Circuit *after* the October decision seekin issuance of a writ of mandamus pointedly demonstrate their misapprehension of the October mandate. At least three obvious examples of such misapprehensions are contained in respondents' proposed mandamus order (Appendix A hereto) prepared by them for the Fifth Circuit.[1] (Appendix F to respondents' mandamus request to the Fifth Circuit). Respondents mistakenly believed at that time that the October decision and mandate required the Commission:

> (a) in addition to household goods and commodities in bulk, to except all "of the other groups or classes of commodities traditionally excepted from certificates and permits granting general commodities authority (i.e., classes A and B explosives, size and weight commodities, commodities requiring temperature-controlled equipment, and any other similar area requiring specialized equipment or service) . . ." (*Ibid.*, p. 2) (Also see respondents' reply brief, p. 3, in the mandamus case, Appendix B hereto);
>
> (b) to entirely "[d]iscontinue the use of STCC codes, or equally broad descriptions . . ." (*Id.*), and;
>
> (c) "Except bulk and other specialized forms of service from broadscale grants of specific commodity authority . . ."

[1]Respondents also believed, *inter alia*, that the October decision mandated that applicant carriers must demonstrate, as a prerequisite to a grant of operating authority, that they already possessed the necessary equipment. (Page 29 of respondents' reply brief, filed February 5, 1982, in the mandamus case. (Appendix C hereto). The February mandamus decision at 669 F. 2d 963, n. 7, clarifies that no actual showing of current ownership of the requisite equipment is necessary.

In its February 1982 mandamus decision and order the Fifth Circuit dispelled, *inter alia*, all three of these beliefs held by respondents as to the meaning of the October decision. The February decision clarified that the only two special service exceptions are household goods and commodities in bulk. (669 F. 2d at 962-963 ¶s 4.-5.; and 963 ¶s 3.-4.) And, those two specialized services are to be excluded *only* from grants of general commodities authority, not from grants of specific commodities authority. (*Id.*) Additionally, the Fifth Circuit clarified that the STCC code and other equally broad categories may be used, but applicant carriers must be permitted to seek other categories if they can show they would be unfit, unwilling, or unable to handle the broader categories. (*Ibid.*, 962 ¶2; and 963 ¶2).

2. The plain language of the February mandamus decision expressly states, in no uncertain terms, that it is being issued "*to clarify the mandate* and to direct future compliance with it . . . ." (669 F. 2d at 961). Indeed, for two pages (669 F. 2d at 960-961) of its five-page decision the Fifth Circuit discusses and defends its right to clarify its October decision and mandate.

Clearly, the court of appeals' February mandamus decision was intended to and did resolve genuine ambiguities in its October decision. Thus, the *entire* case and controversy, including the October decision and mandate, is properly before this Court.

Respectfully submitted,

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September 1982

CERTIFICATE OF SERVICE

I hereby certify that on this the 10th day of September 1982, I have served true and accurate copies of the foregoing Reply to Respondents' Brief In Opposition To Petition For Certiorari, upon counsel for all parties, by first-class mail, postage prepaid, in the following manner:

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APPENDIX A

[Respondents' proposed mandamus order.]

PROPOSED ORDER

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-4026

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

PETITION TO COMPEL ENFORCEMENT OF THIS COURT'S MANDATE

Before RUBIN, RANDALL and TATE, Circuit Judges:

Consistent with the foregoing opinion, which supplements our opinion of October 1, 1981, the Interstate Commerce Commission is hereby ordered to comply with the previous decision, which overturned the "policy statement" in Ex Parte No. 55 (Sub-No. 43A) and the "guidelines" adopted as part of Ex Parte No. MC-142 (Sub-No. 1) on the grounds both proceedings promulgated rules which were beyond the scope of the Commission's authority. The Commission has mistakenly limited

its response to our earlier opinion in an attempt—unsuccessful as it must be—to correct a few specifically identified failings, which were merely used as illustrations to highlight the basic rationale we articulated.

Therefore, the Interstate Commerce Commission is hereby directed to take the following actions in order to comply with the Interstate Commerce Act and this Court's opinion and mandate:

1. Rescind by notice in the *Federal Register* the "policy statement" in Ex Parte 55 (Sub-No. 43A) and the "guidelines" promulgated in Ex Parte No. MC-142 (Sub-No. 1);

2. Require applicants for general commodities authority who also seek authority to transport bulk commodities, household goods, or any of the other groups or classes of commodities traditionally excepted from certificates or permits granting general commodities authority (i.e., classes A and B explosives, size and weight commodities, commodities requiring temperature-controlled equipment, and any other similar area requiring specialized equipment or service) to establish by independant evidence: (a) a public need for each of those specialized services and (b) that they are fit, willing, and able to provide the service through the submission of equipment lists, financial statements, or other substantial evidence of record demonstrating the requisite capability and expertise;

3. Discontinue the use of STCC codes, or equally broad descriptions, in framing authority in "fixed molds" and instead grant authority to transport only the classes or groups of commodities for which representative evidence of public need is shown and for which the carrier has demonstrated it is fit, willing and able to perform the service;

4. Except bulk and other specialized forms of service from broadscale grants of specific commodity authority,

absent a showing that applicants are fit, willing and able to provide such specialized service;

5. Require applicants for 50-state authority to establish a public need for the service and their fitness, willingness, and ability to serve points in Alaska and Hawaii through the submission of equipment lists, terminal and other facilities locations, financial statements, and other substantial evidence of record;

6. Require applicants for nationwide authority or for any number of states to provide representative evidence of public need for the service in each state, consistent with this Court's decision in *Miller Transporters, Inc.* v. *United States,* 594 F. 2d 463 (5th Cir. 1979);

7. Vacate by notice in the *Federal Register* decisions and actions of the Commission since October 1, 1981, which grant or issue certificates or permits in violation of the mandate or the foregoing requirements;

8. Submit to this Court and to petitioners within 10 days any interim rules which it proposes to substitute for the invalidated rules, for our approval after we receive petitioners' response; and

10. Publish promptly any interim rules so approved in the *Federal Register.*

It is so ordered.

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Circuit Judge

APPENDIX B

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against the statutory requirement that the carrier demonstrate it is "fit, willing, and able" to perform "the transportation authorized" by the certificate or permit; and (3) representative evidence on the record is required to support every ICC determination of the scope of operations to be authorized consistent with the statutory requirement of public need.

In order to illustrate its crucial holding as to the resaonable scope of certificates and permits intended by Congress pursuant to the new law, this Court discussed in detail and rejected certain specific commodity and territorial descriptions mandated by the ICC below, while approving others. Specifically, the Court held that an applicant requesting general commodities authority would not automatically be fit, willing or able to transport bulk commodities or household goods.[3] In defining the parameters for the reasonable use of the Standard Transportation Commodity Code (STCC) or other broad classifications, the Court held that, even through it may be reasonable to use STCC as a "starting point,"

> [the ICC] may not, however, require all applicants regardless of circumstances to fit Procrustean descriptions, and it may not assume that an applicant fit, willing, and able to carry one commodity in an STCC classification, is fit,

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[3]The illustrative nature of the Court's approach should not be open to question. The "fit, willing, and able" statutory language and the Court's general rationale based upon it apply to many other situations. Indeed, in its opening brief, ATA and other petitioners uniformly spoke in terms of all "specialized commodities," such as "size and weight" commodities or those requiring temperature-controlled equipment, *not* simply household goods and bulk commodities. *See, e.g.*, ATA Initial Br., pp. 26-28.

APPENDIX C

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which might be acceptable to the Commission. Clearly, the Commission's absolute persistence in this type of conduct demands immediate action by this Court.

In disputing the justification for our relief, the Department of Justice claims (DOJ Response, p. 7) that the Commission's rules concerning inclusion of commodities in broad grants of authority were not challenged other than as to automatic inclusion of household goods and bulk commodities. *See also* ICC Memo., p. 6. It disregards the fact that ATA and other petitioners have consistently focused on all "specialized commodities," such as commodities, which of their size or weight require special handling or equipment, or those requiring temperature-controlled equipment, not merely household goods and bulk commodities. Petition, p. 3, n. 3. Clearly where a carrier is to be authorized to hold itself out to provide a specialized service, this Court has held that it must demonstrate that it has the requisite equipment and that it is otherwise willing and able to provide such service. Indeed, a recent licensing decision has focused upon "current ownership of the type of equipment necessary for this type of transportation" in considering the general fitness of a carrier. *Baggett Transp. Co.* v. *United States,* No. 81-7748, (11th Cir. decision dated January 25, 1982.). This Court should not hesitate to clarify the scope of its opinion and mandate as requested in our relief. *See City of Cleveland,* 561 F. 2d at 346.